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No. 97-1287-CFX   Title: Hughes Aircraft Company, et al., Petitioners
v.
Stanley I. Jacobson, et al.

Docketed: February 6, 1998   Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jan 9 1998	Application (A97-501) to extend the time to file a petition for a writ of certiorari from January 21, 1998 to February 5, 1998, submitted to Justice O'Connor.
	Jan 12 1998	Application (A97-501) granted by Justice O'Connor extending the time to file until February 5, 1998.
	Feb 5 1998	Petition for writ of certiorari filed. (Response due March 24, 1998)
	Feb 24 1998	Order extending time to file response to petition until March 24, 1998.
	Mar 23 1998	Motion of Hughes Aircraft Retirees, et al. for leave to file a brief as amici curiae filed.
	Mar 24 1998	Motion of Chamber of Commerce of the United States, et al. for leave to file a brief as amici curiae filed.
	Mar 24 1998	Brief of Pension Benefit Guaranty Corporation in support of petition filed.
	Mar 24 1998	Brief of respondents Stanley Jacobson, et al. in opposition filed.
	Mar 24 1998	Motion of ERISA Industry Committee for leave to file a brief as amicus curiae filed.
	Apr 7 1998	Reply brief of petitioners Hughes Aircraft Company, et al. filed.
	Apr 8 1998	DISTRIBUTED. April 24, 1998
	Apr 27 1998	Motion of Hughes Aircraft Retirees, et al. for leave to file a brief as amici curiae GRANTED.
	Apr 27 1998	Motion of Chamber of Commerce of the United States, et al. for leave to file a brief as amici curiae GRANTED.
	Apr 27 1998	Motion of ERISA Industry Committee for leave to file a brief as amicus curiae GRANTED.
	Apr 27 1998	Petition GRANTED. SET FOR ARGUMENT November 2, 1998. ***
	May 4 1998	Order extending time to file brief of petitioner on the merits until July 2, 1998.
	Jul 2 1998	Joint appendix filed.
	Jul 2 1998	Brief of petitioners Hughes Aircraft Company, et al. filed.
	Jul 2 1998	Brief amici curiae of Hughes Aircraft Retirees Association, et al. filed.
	Jul 2 1998	Brief amici curiae of ERISA Industry Committee, et al. filed.
	Jul 2 1998	Brief amicus curiae of United States filed.
	Jul 2 1998	Brief amicus curiae of American Association of Retired Persons filed.
	Jul 7 1998	Order extending time to file brief of respondent on the merits until August 17, 1998.
	Aug 17 1998	Brief of respondents Stanley Jacobson, et al. filed.
	Aug 17 1998	Brief amicus curiae of National Employment Lawyers

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Entry	Date	Proceedings and Orders
		Association filed.
	Aug 20 1998	Brief amici curiae of At&T, RCA, and Boeing Employees filed.
	Aug 21 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 16 1998	Reply brief of petitioners Hughes Aircraft Co., et al. filed.
	Sep 17 1998	CIRCULATED.
	Sep 25 1998	Record filed.
	Sep 28 1998	Record filed.
	Oct 5 1998	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Nov 2 1998	ARGUED.

No. 97-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 5, 1998

QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred by refusing to follow this Court's holding in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1790 (1996), that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions."
2. Whether the Ninth Circuit erred by limiting *Spink* to plans funded only by employer contributions, even though that limitation is never mentioned in the Court's opinion, has no basis in law or logic, and has been rejected by other circuits.
3. Whether the Ninth Circuit erred by concluding, contrary to three other circuits, that participants in a defined-benefit plan have a legally-cognizable property interest not only in their defined benefits but also in the assets held by the plan.
4. Whether the Ninth Circuit erred by holding, contrary to three other circuits, that an ERISA plan may be forcibly terminated (and its assets distributed) by means not specified in ERISA's exclusive termination provisions.

PARTIES TO THE PROCEEDING

Petitioners Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan were the defendants/appellees below; respondents Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernest O. Blandin, and Richard E. Hook were the plaintiffs/appellants.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Hughes Aircraft Company states that it recently merged with Raytheon Company. Following that merger, two corporations and two pension plans have an interest in this case: Hughes Electronics Corporation, Raytheon Company, Hughes Non-Bargaining Retirement Plan, and Raytheon Non-Bargaining Retirement Plan. All four of these entities were recently named as defendants in an amended complaint. For convenience's sake, however, only the entities identified in the original caption of the case and treated as defendants at the time of the Ninth Circuit's judgment — Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan — are referenced in this petition.

Hughes Electronics Corporation ("HEC") is a wholly-owned subsidiary of General Motors Corporation, which has issued various classes of shares to the public. The earnings of HEC are used to calculate the earnings per share of General Motors Class H common stock. The following are non-wholly owned subsidiaries of HEC that have issued shares to the public: American Mobile Satellite Corporation; PanAmSat Corporation; FLIR Systems, Inc.; and Nippon Avionics Co., Ltd. HEC also has the following non-wholly owned subsidiaries that have not issued shares to the public: Hughes Ispat Limited; Hughes Escorts Communications Limited; Hughes-Kenwood RDSS Inc.; Hughes Olivetti Telecom, Ltd.; Shanghai Hughes Network Systems; Satelitron S.A. de CV; PT Pasific Satelite Nusantara; DIRECTV Japan Kabushiki Kaisha; Galaxy Entertainment de Venezuela, C.A.; Servicitos Galaxy Sat III R, C.S.; and SurFin, Ltd.

Raytheon Company issues shares to the public. It does not have a parent company. The non-wholly owned subsidiaries of Raytheon Company have not issued shares to the public. They are: RAYCOM, INC.; Raytheon Appliances, S.A.; Constellation Communications, Inc.; Space Imaging, Inc.; Raytheon Saudi Arabia Limited; DISA-Raytheon Ingenieria y Construccion, S. de R.L. de C.V.; Instrumentation Service, S.A.; Litwin S.A.; Polytec, S.A.R.L.; Raytheon Engineers & Constructors France S.a.r.l.; Raytheon Engineers & Constructors Italy S.r.l.; Secore Services Incorporated; Stearns Catalytic Ingenieria y Construccion Chile Limitada; Raytheon do Brasil Comercio Ltda.; Gesellschaft fuer Verteidgungs Systeme mbH; Systems For Defense Company; Raytheon Philippines, Inc.; Standard Missile Company, L.L.C.; Switchcraft Far East Company, Ltd.; Thoray Electronics Corporation; ACCSCO S.A.; HE Microwave; Advanced Toll Management Corp.; Serampang Hughes Sdn Bhd; Empresa Nacional de Optica S.A.; Gulf Industrial Technology Co.; Hughes Arabia Limited; Hughes Research Laboratories; UKADGE Systems Limited; International Electro-Optical Industry Anonim Sirkell; Standard Missile Co. LLC.; Air Command System International S.A.S.; AMRAAM International Licensing Company; ERAPSCO; H & R Company; Harris-Magnavox Systems Company; Lifestar Digital Television, Inc.; IRISS Company; Hughes Pareto Research Partnership; HMK; HKV; SJ & LA Associates.

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IN THE

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OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

As Judge William Norris explained in his dissent below, this lawsuit is all about respondents' quest for a "pot of gold" to which they are not entitled. App. 27a. By authorizing that quest, the Ninth Circuit (1) flouted this Court's recent decision reversing that circuit in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); (2) effected a revolution in the law of employee benefits without any basis in law or logic; and (3) brought itself (once again) sharply into conflict with other circuits. Summary reversal or plenary review by this Court is urgently needed to prevent the havoc that the decision below, if allowed to stand, would wreak across a vast expanse of employee-benefit law.

Respondents are retired employees who are participants in petitioner Hughes Aircraft Company's Non-Bargaining

Retirement Plan. The Plan is a defined-*benefit* plan, which guarantees participants a fixed (or "defined") level of benefits regardless of the plan's investment success or failure. Such a plan is fundamentally different from a defined-*contribution* plan, in which contributions are fixed and plan participants receive whatever investment returns those contributions generate.

The Hughes Plan has invested its assets wisely, with excellent results. This lawsuit is an attempt by Plan participants to grab those investment returns for themselves, even though they are entitled only to the defined benefits that they are concededly receiving. To this end, respondents assert that Hughes violated various provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") by amending the Plan in 1989 and 1991, and that the latter amendment effected a termination of the Plan requiring immediate distribution of all Plan assets.

The District Court rejected respondents' extraordinary attempt to lay claim to more than their defined benefits. A divided Ninth Circuit panel reversed. In doing so, the majority (Judges Pregerson and Fletcher) swung a wrecking ball through ERISA law, provoking a vigorous dissent from Judge Norris.

The majority erred in three basic respects:

First, the majority refused to follow *Spink*. In reversing a previous attempt by the Ninth Circuit to impose fiduciary duties on ERISA plan sponsors, this Court squarely held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." *Spink*, 116 S. Ct. at 1789. The majority below limited *Spink* to plans funded entirely by employers, and declared it inapplicable to plans (like this one) "funded by both employer and employee contributions" (so-called "contributory" plans). App. 14a.

This Court's reasoning in *Spink*, however, had nothing whatsoever to do with the source of plan funding. Indeed, nowhere in this Court's opinion is there any mention whether

the plan at issue was contributory or non-contributory. Thus, as Judge Norris explained, the majority relied upon a "false" distinction to circumvent *Spink*. *Id.* at 37a. That asserted distinction, moreover, brought the Ninth Circuit squarely into conflict with the Third, Sixth, Seventh, and Tenth Circuits, each of which has held — in the specific context of contributory plans — that amendments to ERISA-covered plans do not implicate the statute's fiduciary duties. As a practical matter, moreover, the decision below threatens to unsettle the law governing *all* contributory plans — including not only pension plans but also such familiar employee-benefit plans as 401(k) plans and medical plans.

Second, the majority blurred the critical distinction between defined-benefit and defined-contribution plans. By mistakenly embracing the premise underlying all of respondents' claims — that they have a property interest not only in their defined *benefits* but also in Plan *assets* — the Ninth Circuit brought itself into direct conflict with at least the Second, Third, and Seventh Circuits, each of which has rejected similar attempts by plan participants to claim ownership of assets held by defined-benefit plans to which employees have contributed. *See, e.g.*, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994).

Third, the decision below reopens, and incorrectly decides, another very important and previously settled issue — whether Title IV of ERISA provides the exclusive means of terminating a defined-benefit plan. In order to obtain a distribution of Plan assets, respondents seek a judicial declaration that the Plan was terminated in 1991. The Ninth Circuit initially stated that "because ERISA does not define when a termination occurs, . . . it is appropriate for a court to look to trust principles to determine when a termination occurs." App. 11a n.3. But ERISA indisputably *does* define when termination occurs, and, indeed, Congress specifically amended the statute in 1986 to clarify that Title IV of ERISA sets forth the "[e]xclusive means of plan termination." 29 U.S.C. § 1341. When Hughes pointed

out this error in its rehearing petition, the Ninth Circuit simply deleted its manifestly incorrect reasoning, but refused to recede from its holding that respondents could proceed with their claim that the Plan had terminated outside the statutory framework.

That holding conflicts with decisions of the Third, Fourth, and Fifth Circuits, all of which agree that Title IV of ERISA provides the exclusive means for terminating a defined-benefit plan. If allowed to stand, the decision below would transform virtually any amendment to a benefit feature of an ERISA-covered plan into a litigable claim that the plan has been terminated and that plan assets must be distributed immediately. As a practical matter, that holding makes plan amendments very perilous, if not impossible.

To correct these serious misinterpretations of ERISA, this Court should either summarily reverse the Ninth Circuit or grant plenary review of the questions presented by this petition.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 105 F.3d 1288 (1997), and is reprinted in the Appendix ("App.") at 1a-48a. The order amending the opinion and denying the petition for rehearing and suggestion for rehearing *en banc* is reported at 128 F.3d 1305 (1997), and is reprinted at App. 49a-50a. A subsequent order clarifying the amendment order is reported at 1998 WL 23252, and is reprinted at App. 51a-52a. For this Court's convenience, the passages of the opinion deleted by the amendment order are indicated with strikeout text. The District Court's unpublished judgment and order granting petitioners' motion to dismiss are reprinted at App. 53a-63a.

JURISDICTION

The Ninth Circuit entered judgment on January 23, 1997. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc*; the Ninth Circuit denied both on October 23, 1997. Justice O'Connor granted an extension of

the time for filing this petition to and including February 5, 1998. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The statutory provisions involved in this case are set forth at App. 65a-129a.

STATEMENT OF THE CASE

A. The Hughes Plan

Petitioner Hughes Aircraft Company manufactures aerospace and electronics equipment. Since 1955, it has sponsored the pension plan at issue in this case, petitioner Hughes Non-Bargaining Retirement Plan, for its employees. *See* App. 134a.

Two of the Plan's features are pertinent here. *First*, the Plan is a defined-benefit plan: participants are guaranteed a fixed level of benefits upon retirement regardless of the Plan's investment success or failure. *Second*, until 1991, the Plan was entirely contributory: it was funded by contributions from the employees as well as from Hughes. The latter feature was amended on January 1, 1991; since then, the plan is only partly contributory. New participants in the Plan no longer make contributions, and are entitled to a correspondingly lower level of benefits upon retirement. Plan participants who retired prior to the 1991 amendment continue to receive the higher level of defined benefits; plan participants who had not yet retired as of January 1, 1991, could choose between the contributory and non-contributory benefit structures. *See id.* at 138a. Even after the 1991 amendment, more than 66,000 Hughes employees have continued to accrue or receive benefits under the original contributory benefit structure. *See id.* at 146a-47a.

According to respondents, the Plan's assets came to exceed its accrued liabilities by more than $1 billion by the late 1980s. *See id.* at 136a. In 1987, Hughes suspended its contributions to the Plan. *See id.* at 132a, 137a. In 1989, the company

amended the Plan to provide special early retirement incentives, which entitled certain active employees to improved pension benefits if they elected to retire. *See id.* at 137a-38a.

B. The Jacobson Complaint

Respondents are five retired Hughes employees and Plan participants. They filed this lawsuit in 1992, alleging that they are entitled not only to their defined benefits under the Plan, but also to any and all "excess" assets in the Plan. *See id.* at 131a, 141a. The complaint also alleged that "the Plan was terminated on January 1, 1991," the date of the amendment creating the non-contributory benefit structure, and asked the court to order "an equitable distribution of the surplus assets" as of that date. *See id.* at 132a, 138a.

Specifically, respondents advanced six different claims charging that Hughes violated ERISA by amending the Plan to create the early retirement program in 1989 and the non-contributory benefit structure in 1991. The first claim alleged that both these amendments violated ERISA's "anti-inurement" provision, 29 U.S.C. § 1103(c)(1), because they entailed use of "excess Plan assets" for the benefit of the employer rather than Plan participants. *See* App. 139a. The second, fifth, and sixth claims alleged that the amendments involved a breach of Hughes' fiduciary duties under ERISA, 29 U.S.C. §§ 1104, 1106, for the same reason. *See* App. 139a, 141a-43a. The third claim alleged that the 1991 amendment deprived Plan participants of vested, nonforfeitable benefits in violation of 29 U.S.C. § 1053(a). *See* App. 139a-40a. The fourth claim alleged that the 1991 amendment had "terminated" the Plan, and that Hughes had violated ERISA by failing to distribute to Plan participants all "surplus" Plan assets as of January 1, 1991. *See id.* at 140a-41a.

As relief, the complaint requested (1) an equitable distribution of "all excess Plan assets" to Plan participants, *see id.* at 143a; (2) an injunction prohibiting the use of Plan assets to pay benefits under the non-contributory structure, *see id.*;

(3) the appointment of a new trustee to administer the Plan, *see id.*; (4) an order requiring Hughes to restore all Plan assets that had been used to pay benefits under the early retirement program and non-contributory benefit structure, *see id.*; and (5) an award of attorneys' fees, *see id.*

C. The District Court Proceedings

The District Court (Gadbois, J.) dismissed the complaint for failure to state a claim upon which relief could be granted. *See* App. 53a-63a. The court held that respondents' claims to all or part of any investment "surplus" were meritless because "unless and until a Plan termination occurs, plaintiffs are entitled to nothing other than the Plan's defined benefits." *Id.* at 55a-56a. And no termination occurred here as a matter of law because "plan terminations must be accomplished pursuant to the rules specified in 29 U.S.C. § 1341." App. 59a. The District Court also emphasized that participants in defined-benefit plans do not have any "right" to surplus assets, "but instead [are] entitled to the defined benefit," *id.* at 56a, and that an employer's fiduciary duties are not implicated by plan amendments, *see id.* at 57a-58a, 60a-62a. Respondents appealed.

D. The Ninth Circuit Proceedings

A divided panel of the Ninth Circuit reversed. *See* App. 1a-48a.

The majority first held that this Court's holding in *Spink* that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries" under ERISA, 116 S. Ct. at 1789, does not apply to plans (like this one) that are funded in part by employee contributions. *See* App. 7a-9a.

Next, the majority held that, while (under *Spink*) "an employer may have the discretion to decide how to use an asset surplus attributable solely to *employer* contributions," where a plan is funded by both employer and employee contributions, an employer does not have the discretion to restructure the plan

in a manner that benefits either itself or employees who have not yet participated in the plan. App. 10a (emphasis in original). According to the panel, by amending the Plan in ways that allegedly benefitted itself, Hughes may have violated 29 U.S.C. § 1103, which provides that "assets of a plan shall never inure to the benefit of any employer." App. 11a-12a.

Next, the majority held that respondents had a "vested right" to the income generated by their contributions if that income exceeded their defined benefits under the Plan. *Id.* at 18a. Accordingly, the majority held that Hughes' amendments to the Plan may have violated the vesting and nonforfeiture requirements of 29 U.S.C. § 1053. *See* App. 21a.

Finally, the majority held that respondents were entitled to pursue their claim for an immediate distribution of Plan assets on the theory that Hughes had "terminated" the Plan. The majority held that whether Hughes had terminated the Plan in 1991 by creating an additional benefit structure was not a pure question of law that could be resolved on a motion to dismiss. *See id.* at 10a-11a & n.3, 21a, 22a-23a. The majority directed the District Court to develop the record to determine whether the 1991 amendment had converted the Plan into a "wasting trust" and thereby effected a "constructive termination" of the Plan. *Id.* at 11a n.3.

The majority gave two reasons for this holding. *First*, the majority cited a pre-ERISA Treasury Department regulation stating that "[w]hether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case." *See* App. 11a n.3 (quoting 26 C.F.R. § 1.401-6(b)(1)); App. 22a (same). *Second*, the majority held that "[b]ecause ERISA does not define when a termination occurs, we believe it is appropriate for a court to look to trust principles to determine when a termination occurs." App. 11a n.3.

Judge Norris dissented. He explained that this case was governed by *Spink*, and that the distinction advanced by the majority — that *Spink* "involved an amendment to a non-contributory plan, while this case involves an amendment to a contributory plan" — provided "no basis whatsoever" for disregarding that controlling authority. App. 36a.

Judge Norris further concluded that, in any event, the challenged amendments could not possibly have violated any duties under ERISA. He explained that participants in a defined-benefit plan are entitled *only* to their defined benefits, and have no statutorily-protected property interest in any investment return on contributions to the plan (regardless of whether those contributions were made by them, their employers, or both). *See id.* at 40a, 42a. Judge Norris also emphasized that ERISA's anti-inurement and fiduciary-duty provisions are not implicated by the amendment of a pension plan. *See id.* at 30a-32a, 40a, 44a-47a. "It is understandable that the plaintiffs (and their lawyers) covet the financial gains that resulted from the successful investment strategy that dramatically increased the value of the Plan's assets in the 1980s. But that does not diminish the reality that they have failed to state a legally cognizable claim." *Id.* at 48a.

Judge Norris also challenged the majority's holding that the question whether the 1991 amendment terminated the Plan was not a pure question of law. Judge Norris correctly emphasized that no relevant facts were in dispute. Rather, the only matter in dispute was whether the 1991 amendment "terminated" the plan — a question on which no factual development was necessary or appropriate. Judge Norris pointed out that "as a matter of law" "the Plan was not terminated by the addition of a non-contributory benefit structure." *Id.* at 44a; *see also id.* at 39a ("[T]his is a pure question of law."). Thus, as Judge Norris concluded, "there is no basis in ERISA, the caselaw, or logic for the majority's decision that in amending its pension plan, Hughes effectively terminated the plan." *Id.* at 48a.

Hughes filed a petition for rehearing and suggestion for rehearing *en banc*. The Ninth Circuit denied the petition, but the panel amended its opinion in two respects. *See id.* at 49a-

50a. *First*, the panel deleted the sentence justifying recourse to the common law of trusts on the ground that "ERISA does not define when a termination occurs." *Id.* at 49a, 11a. The court, however, did not recede from its holding that respondents were entitled to rely on the common law of trusts as the basis of their theory that the Hughes Plan had been "terminated" in 1991. *Second*, the panel deleted one of its two references to the obsolete Treasury Department regulation in support of its holding that the question of plan termination is not a pure question of law. *Id.* at 50a, 22a-23a. Again, however, the panel did not recede from that holding.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Erred by Creating Special Nonstatutory Limits on an Employer's Discretion to Amend One Particular Type of Employee-Benefit Plan — a Contributory Plan.

The Ninth Circuit plainly erred by refusing to follow this Court's recent decision in *Spink*, and instead devising special nonstatutory limits on an employer's discretion to amend one particular type of employee-benefit plan — a contributory plan.

As this Court has emphasized, ERISA grants employers broad discretion to design and amend their employee-benefit plans. *See, e.g., Spink*, 116 S. Ct. at 1788-90. Employers are not required to establish such plans in the first instance. *See id.* at 1788. If an employer does choose to provide a benefit plan, it is free to choose the amount of benefits provided. *See id.* After the plan is created, the employer retains broad discretion to amend or terminate it, including discretion to alter or eliminate benefit features. *See* 29 U.S.C. §§ 1341, 1342; *Spink*, 116 S. Ct. at 1789-90; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995). The reason for these rules is apparent: depriving the employer of discretion over the design or amendment of a plan would provide a strong disincentive to establish such a plan in the first

place. *See, e.g., Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995).

The decision below eviscerates these fundamental and well-established principles. The Ninth Circuit held that employers do *not* have discretion to amend one particular, and quite common, type of benefit plan — a contributory plan, *i.e.*, a plan funded in whole or in part by employee contributions. That revolutionary holding has no basis in ERISA, and replaces the plain statutory text with uninformed judicial policymaking.

A. The Ninth Circuit Refused to Follow This Court's Recent Decision in *Spink*.

The decision below represents an unsubtle attempt to circumvent the controlling authority of *Spink*. This Court expressly held in that case that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions." 116 S. Ct. at 1790. Notwithstanding that unambiguous holding, the Ninth Circuit authorized respondents to proceed with their claims that Hughes' 1989 and 1991 amendments to the Plan violated ERISA's fiduciary provisions. *See* App. 13a-18a, 23a-25a.

The Ninth Circuit thereby flouted *Spink*. Indeed, the fiduciary-duty claim in *Spink* was the same as the one here: that an employer had breached its fiduciary duties under ERISA by amending a defined-benefit plan to use plan assets for its own benefit rather than for the exclusive benefit of plan participants. *See* 116 S. Ct. at 1787. The Ninth Circuit had held in *Spink* — in disagreement with nine other circuits — that a plan sponsor should be held to fiduciary standards when providing a new pension benefit. *See Spink v. Lockheed Corp.*, 60 F.3d 616, 622-24 (9th Cir. 1995), *rev'd*, 116 S. Ct. 1783 (1996). This Court unanimously reversed that holding, explaining that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 116 S. Ct. at 1789.

The majority below evaded that holding by limiting *Spink* to plans that do not include any employee contributions (*i.e.*,

"non-contributory" plans). "If employees contribute to the plan, the employer has a fiduciary duty to the employees when it amends the plan to use an asset surplus." App. 14a; *see also id.* at 25a (same).[1] As Judge Norris pointed out, however, that distinction between non-contributory and contributory plans is wholly contrived. *See id.* at 46a ("The majority's holding cannot be squared with [*Spink*], nor with cases from two other circuits which have held that pension plan amendments that create retirement windows with incentives for early retirement do not violate [ERISA's fiduciary-duty provisions.]") (citing *Belade v. ITT Corp.*, 909 F.2d 736, 737-38 (2d Cir. 1990), and *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988)).

Even a cursory review of *Spink* ratifies Judge Norris' view. This Court's reasoning was based not on the nature of the *plan* at issue, but instead on the nature of the *employer actions* at issue. The Court observed that its decision turned on the statutory definition of "fiduciary," which conspicuously omits any reference to plan design or amendment. *See* 116 S. Ct. at 1789. As a result, the Court explained, actions relating to plan administration implicate fiduciary duties while actions relating to plan design or amendment do not. *Id.* The Court also emphasized that ERISA's definition of a fiduciary "speaks simply of a 'fiduciary with respect to a plan,'" and does *not* distinguish between different types of plans. *Id.* at 1789-90 (quoting 29 U.S.C. § 1002(21)(A)).

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[1] The Ninth Circuit also asserted that Hughes fell within the statutory definition of a "fiduciary" because it "dispos[ed]" of plan assets in amending the plan. *See* App. 16a. That assertion is plainly refuted by *Spink*. The *Spink* Court expressly held that "'[the] defined functions [in the definition of fiduciary] do not include plan design.'" 116 S. Ct. at 1789 (quoting *Siskind v. Sperry Retirement Program*, 47 F.3d 498, 505 (2d Cir. 1995)) (brackets in original). Accordingly, amendments or changes in plan design are simply not covered by ERISA's fiduciary provisions, regardless of whether they could be said to involve some "disposition" of plan assets.

Indeed, nowhere in *Spink* did this Court even mention whether the plan was contributory or non-contributory. Thus, the Ninth Circuit majority sought to "distinguish" *Spink* on a basis that not only contravenes the rationale of that case, but is not even supported by this Court's description of the relevant plan. Thus, as Judge Norris aptly concluded, "there is no basis whatsoever for limiting the precedential value of [*Spink*] to non-contributory plans." App. 36a.

Moreover, the Ninth Circuit's ostensible distinction between contributory and non-contributory plans is meaningless. The only practical difference between the two types of plans is whether the employer funds them *directly*, through contributions to the plan, or *indirectly*, through wages paid to employees that the employees then contribute to the plan. "In terms of economic reality, it should make no difference whether an employee makes contributions to a plan directly, or whether the employee makes contributions indirectly through the employer. Either way, the contributions are the economic product of the employee's services." *Id.* at 37a (Norris, J., dissenting).

The Ninth Circuit's nonstatutory distinction between contributory and non-contributory plans is particularly inappropriate in the context of a statute as "comprehensive and reticulated" as ERISA. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980). As this Court has emphasized, ERISA "is an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). Courts must be especially reluctant to "tamper" with a statute "crafted with such evident care." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

In short, *Spink* cannot fairly be limited to non-contributory plans. The Ninth Circuit's refusal to follow controlling authority is grounds for summary reversal.

B. The Ninth Circuit's Distinction Between Contributory and Noncontributory Plans Brings It into Conflict with the Third, Sixth, Seventh, and Tenth Circuits.

Even if *Spink* could be limited to non-contributory plans, the decision below would still merit review because it conflicts with decisions from at least four other circuits holding — in the specific context of *contributory* plans — that plan amendments do not implicate ERISA's fiduciary duties.

For example, the Seventh Circuit has held, in a case involving a contributory defined-benefit plan, that "[w]hen making the amendments, [the employer] dealt with the plan as settlor, not as trustee." *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (cited with approval in *Spink*, 116 S. Ct. at 1789). The Third Circuit has adopted the same approach and reached the same result, again in the specific context of contributory defined-benefit plans. *See Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.) (holding that ERISA's fiduciary duties "do not attach to business decisions related to modification of the design of a pension plan"), *cert. denied*, 513 U.S. 956 (1994); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989) (same); *see also Trenton*, 832 F.2d at 809.

The Sixth and Tenth Circuits have held likewise in the specific context of contributory plans. *See Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988) ("The case law . . . makes it clear that when an employer decides to establish, amend, or terminate a benefits plan . . . its actions are not to be judged by fiduciary standards."), *cert. denied*, 490 U.S. 1020 (1989); *Salazar v. Sandia Corp.*, 656 F.2d 578, 580 (10th Cir. 1981) (no fiduciary duty applies when an amendment to a

defined-benefit plan causes it to become non-contributory and plan participants continue to receive their promised benefits).[2]

C. The Ninth Circuit's Decision Would Adversely Affect All Kinds of Employee-Benefit Plans.

The Ninth Circuit's holding that ERISA imposes special nonstatutory limits on an employer's discretion to amend contributory plans also has far-flung practical implications. Such plans include not only pension and other retirement plans, but also health plans, disability plans, and a wide range of other welfare plans for employees.

The decision below establishes that contributory plans are governed by a special body of unwritten law, and employers can only guess what new obligations the courts will retroactively impose on them in future cases. Employer actions that are indisputably legal with respect to non-contributory plans — such as the sort of routine amendments at issue here — are suddenly open to legal challenge. As a result, employers can no longer assume that the settled body of ERISA law (including *Spink*) will apply to any plan to which employees have contributed.

The practical consequences of the ruling below are staggering. Contributory plans are common: more than 60% of all health plans, nearly all savings and thrift plans, and many defined-benefit pension plans require or allow employee contributions.[3] As a result, the Ninth Circuit's special rules for

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[2] The Second Circuit's decision in *Belade*, cited by Judge Norris, held without qualification that an employer's decision to use plan assets to fund an early retirement program does not violate any fiduciary duty under ERISA, without even mentioning whether the plan at issue was contributory or non-contributory. *See* 909 F.2d at 737-38.

[3] *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments, 1993*, Bulletin 2456 (Nov. 1994) at 49; General Accounting Office, *Employment-Based Health Insurance: Costs Increase and Family Coverage Decreases*, GAO/HEHS-

(continued...)

contributory plans would become the norm, not the exception. Even if the damage could be limited to contributory defined-benefit pension plans, moreover, the consequences would still be extraordinary: such plans cover more than 1 million American workers and retirees, and hold more than $60 billion in assets. *See* App. 149a-50a.

Under ERISA's broad provisions for service of process and venue, moreover, it is impossible to limit these adverse effects to the geographical confines of the Ninth Circuit. *See* 29 U.S.C. § 1132(e)(2). The statute confers nationwide jurisdiction for service of process, *see, e.g., Bellaire Gen. Hosp. v. Blue Cross & Blue Shield of Mich.*, 97 F.3d 822 (5th Cir. 1996), and allows a lawsuit to be brought in any district where the plan is administered, where the breach took place, or where a defendant resides or may be found, *see, e.g., Varsic v. United States Dist. Ct.*, 607 F.2d 245, 248 (9th Cir. 1979). Thus, most of the nation's major sponsors of ERISA-covered plans (including pension, medical, disability, and other welfare plans) now confront the risk that all of their actions with respect to their plans will be subjected to judicial review under the unprecedented standards imposed below.

II. The Ninth Circuit's Decision Blurs the Distinction Between Defined-Benefit and Defined-Contribution Plans, Thereby Conflicting with Other Circuits and Threatening the Stability of Defined-Benefit Plans.

The decision below rests, at bottom, on the erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan. Respondents are concededly receiving their defined benefits; the challenged amendments in no way affect those benefits. Rather, respondents contend that their property

[3] (...continued)
97-35 (Feb. 1997) at 8; U.S. Dept. of Labor, Bureau of Labor Statistics, *Employee Benefits in Medium and Large Private Establishments, 1995* (press release, July 25, 1997) at 2; App. 149a-50a.

rights extend to the Plan assets, and that the challenged amendments violated those rights. By accepting that contention, the Ninth Circuit revealed a basic misunderstanding of pension plans, brought itself squarely into conflict with the holdings of other circuits, and threatened the very policies underlying ERISA.

"A 'defined benefit pension plan,' as its name implies, is one where the employee, upon retirement, is entitled to a *fixed* periodic payment." *C.I.R. v. Keystone Consol. Indus.*, 508 U.S. 152, 154 (1993) (emphasis added). The plan must pay employees their defined benefits regardless of its investment success or failure; if the plan is underfunded, the employer must make up the difference. A defined-contribution plan, in contrast, is one where "the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide." *Nachman*, 446 U.S. at 364 n.5 (internal quotation omitted). The benefits paid are wholly dependent on the plan's investment success or failure; if the plan fares poorly, the employees' benefits will be reduced accordingly. The investment risk in a defined-benefit plan thus rests upon the employer, whereas the investment risk in a defined-contribution plan rests upon the employees. *See, e.g., Georgia-Pacific*, 19 F.3d at 1186.

Thus, as Judge Norris explained below, the amendments challenged in this case did not affect respondents' "rights," because respondents had no rights in the Plan assets, but only in the defined benefits that they were concededly receiving. App. 30a. Whether a defined-benefit plan has a surplus or a deficit at any given moment prior to plan termination is of no consequence to plan participants — regardless of the plan's financial health, they are entitled to their defined level of benefits, no more and no less. *See, e.g., Georgia-Pacific*, 19

F.3d at 1189-90.[4] The amendments at issue here, accordingly, could not possibly have violated ERISA's fiduciary, anti-inurement, vesting, or other provisions.

Other courts of appeals have squarely rejected similar attempts to convert a contributory defined-benefit plan into a defined-contribution plan. The Seventh Circuit's *Georgia-Pacific* opinion is a particularly good example. That case, like this one, involved a contributory defined-benefit plan. *See* 19 F.3d at 1185 & n.†. The employer there amended the plan as part of an effort to resist a hostile takeover; under the amended plan, a change in control of the company would trigger an increase in benefits to current employees sufficient to exhaust any surplus assets accumulated under the plan. *See id.* at 1185-86. The takeover succeeded, the current employees' benefits were increased, and the plan assets were depleted. The retired employees sued, alleging that the employer's amendment of the plan to use the plan assets for its own ends violated ERISA's fiduciary provisions. There, as here, the crux of the plaintiffs' argument was that "they 'owned' the surplus," in light of their contributions to the plan, and that the employer unlawfully "gave away 'their assets'" by amending the plan to deplete the plan assets in a manner that did not benefit them. *Id.* at 1189; *see also id.* at 1186 ("What this suit depends on is a cry of 'Not with our money, you don't!'").

[4] The only exception to this general rule is expressly created by the statute itself: regardless of the level of defined benefits, employees have a "vested right" to receive benefits equal to their mandatory contributions plus an imputed rate of interest. 29 U.S.C. §§ 1053(a)(1), 1054(c)(2). These vesting provisions ensure that employees cannot receive less than they would have made by putting their money in a conservative, interest-bearing account, thus preventing employers from requiring employees to contribute to a plan in exchange for an unfairly low level of defined benefits, as measured by a defined *interest* rate. Nowhere, however, does ERISA authorize or entitle employees to receive any of the additional *investment* return that may have been generated by their mandatory contributions.

The Seventh Circuit, per Judge Easterbrook, squarely rejected the plaintiffs' claim. The *Georgia-Pacific* opinion, in sharp contrast to the opinion below, both recognized and emphasized the fundamental distinction between defined-benefit and defined-contribution plans. *See* 19 F.3d at 1186-87, 1189-90. "[T]he retirees do not own the assets of a defined-benefit pension plan. Their contributions purchased not a pool of assets (as would be the case with a defined-contribution plan) but a promise of benefits." *Id.* at 1186. An employer's use of plan assets in a defined-benefit plan, the court held, simply did not implicate ERISA's fiduciary duties because plan participants had no property interest in any alleged surplus assets. "A defined-benefit plan gives current and former employees property interests in their pension benefits but not in the assets held by the trust." *Id.* at 1189.[5]

Here again, the Ninth Circuit brought itself into manifest conflict with the Seventh Circuit, as well as with the Second and Third Circuits, each of which also has held that "[p]articipants in a defined benefit plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities." *Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia*, 23 F.3d at 831 n.2, 832-33. As these cases emphasize, the participants' "benefits" in a contributory defined-benefit plan do *not* include a portion of any plan assets above and beyond their defined benefits. *See, e.g., Brillinger*, 130 F.3d at 64; *Malia*, 23 F.3d at 831-33 (same). If this case had been filed in

[5] The Ninth Circuit attempted to distinguish *Georgia-Pacific* on the ground that "[t]here was *no* allegation in [that case] that the employer transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants of the plan." App. 17a (emphasis in original). That asserted distinction, however, relates to the *content* of an employer's fiduciary duties, not to the antecedent question whether the employer has any such duties at all with respect to the challenged action. *See Spink*, 116 S. Ct. at 1788-89 ("The Court of Appeals erred by not asking whether fiduciary status existed in this case before it found a violation.").

the Second, Third, or Seventh Circuits, accordingly, it would readily have been dismissed.

By blurring the important distinction between defined-benefit and defined-contribution plans, the opinion below poses a grave threat to ERISA's fundamental goals of encouraging the adoption and financial stability of employee pension plans. *See, e.g.*, 29 U.S.C. §§ 1001, 1001b. For plan participants, persuading the courts to supplement a defined-*benefit* plan with a defined-*contribution* floor would offer the best of both worlds: they would be entitled to a share in any surplus if the plan's investments did well, but they would not have to worry about a reduction in benefits if the plan's investments did poorly. As the Seventh Circuit has explained, however, "[r]ational employers would respond to [such an asymmetric] structure by reducing the levels of benefits promised in plans (or by creating fewer plans). Neither effect would serve employees' long run interests; neither would be consistent with the purposes underlying ERISA." *Georgia-Pacific*, 19 F.3d at 1190. *See also Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 163 (7th Cir. 1988) (Posner, J.).[6]

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[6] The Ninth Circuit's analysis is flawed in yet another respect: its uncritical acceptance of respondents' legally untenable allegation that the addition of the non-contributory benefit structure to the existing Hughes Plan created two distinct plans, even though all of the benefits continue to be paid from a single fund. *See* App. 10a-11a, 16a-17a, 23a. As a matter of law, the addition of a new benefit structure to an existing plan does not give rise to a new plan. *See, e.g.*, 26 C.F.R. § 1.414(l)-1(b)(1) ("A plan is a 'single plan' if . . . all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. . . . A plan will not fail to be a single plan merely because . . . [it] has several distinct benefit structures which apply either to the same or different participants."); App. 30a-31a (Norris, J., dissenting) ("This argument is meritless. The 1991 amendment did not create a separate pension plan; it merely added an alternative benefit structure under the existing Plan."). Because this case involves only a single plan as a matter of law, there is no legal basis for the conclusion that the use of plan assets to fund a new benefit structure involves a withdrawal of assets from the plan. *See* App. 10a-12a, 23a.

III. The Ninth Circuit Erred by Rejecting the Unanimous Holdings of Other Circuits that Title IV of ERISA Provides the Exclusive Means of Terminating a Defined-Benefit Plan.

The Ninth Circuit also erred by authorizing respondents to proceed with their claim that the amendment creating the non-contributory benefit structure (effective January 1, 1991) amounted to a "termination" of the Plan that required immediate distribution of all Plan assets as of that date. Contrary to the Ninth Circuit's assertion (deleted from the opinion in response to Hughes' rehearing petition) that "ERISA does not define when a termination occurs," App. 11a n.3, the statute does define when the termination of a defined-benefit plan occurs. Indeed, those termination provisions occupy an entire title (Title IV) of the statute, *see* 29 U.S.C. §§ 1301-1461, and are administered by a distinct federal agency, the Pension Benefit Guaranty Corporation ("PBGC"), *see id.* § 1302.

Title IV of ERISA provides two — and only two — means for terminating a single-employer defined-benefit plan: (1) voluntary termination initiated by the employer, 29 U.S.C. § 1341; and (2) involuntary termination initiated by the PBGC, *id.* § 1342. The statute could scarcely be more explicit on this point:

> **§ 1341. Termination of single-employer plans**
>
> **(a) General rules governing single-employer plan terminations**
>
> **(1)** ***Exclusive means of plan termination***
>
> Except in the case of a termination for which proceedings are otherwise instituted by the [PBGC] as provided in section 1342 of this title, a single-employer plan may be terminated *only* in a standard termination under subsection (b) of this section or a

> distress termination under subsection (c) of this section.

29 U.S.C. § 1341(a)(1) (emphasis added). The statute contains no provision authorizing plan participants (such as respondents) to initiate a termination or allowing courts to declare or order such a termination pursuant to common-law standards.

Because respondents could not and did not allege that the 1991 amendment involved the statutory termination mechanism, their claim that Hughes terminated the Plan on January 1, 1991, necessarily fails as a matter of law. Accordingly, as Judge Norris recognized, there is no legal basis for any further proceedings on that claim. *See* App. 34a-35a, 43a-44a.

In particular, there is no legal basis for the Ninth Circuit's holding that respondents are entitled to proceed with a nonstatutory theory of termination based on the common law of trusts. Although common-law principles may provide guidance for filling in ERISA's interstices, *cf. Varity Corp. v. Howe*, 116 S. Ct. 1065, 1070 (1996), they cannot override plain statutory text, *see, e.g., Mertens,* 508 U.S. at 259. Because ERISA expressly sets forth the "exclusive means of plan termination," courts lack authority to devise alternative means of plan termination. The Ninth Circuit's opinion, as amended in response to Hughes' rehearing petition, provides no justification for its recourse to the common law. *See* App. 11a n.3. The court simply deleted its original erroneous justification (that "ERISA does not define when a termination occurs") without receding from its endorsement of a nonstatutory theory of termination. *See id.*

It is hardly surprising that other circuits have squarely rejected similar attempts to circumvent ERISA's statutory termination mechanism. In *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990), the plaintiffs argued that two pension plans had been terminated pursuant to the underlying plan terms when the

employer ceased operations and terminated all its employees. *See id.* at 33-34. The *Phillips* plaintiffs sought the very relief respondents seek here: "a judicial determination that the plans had in fact been dissolved and that the participants were entitled to a distribution of the assets." *See id.* at 33. The Fourth Circuit readily rejected their claims. Whether there had been a termination within the meaning of the *plan*, the Court explained, was immaterial — there could have been no termination within the meaning of the *statute* absent "strict compliance" with the statutory termination provisions. *See id.* at 34. Because those provisions had not even been invoked, there could have been no termination as a matter of law. *See id.* at 34 & n.*. "[S]trict compliance with the statute is the sole means by which a pension plan subject to the provisions of ERISA may be terminated." *Id.* at 34.

Similarly, both the Third and Fifth Circuits have rejected the notion that pension plans can be terminated outside ERISA's exclusive statutory framework. Like the plaintiffs in *Phillips*, the plaintiff in *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), sought a judicially-ordered plan termination pursuant to the terms of the underlying plan. *See id.* at 578-79. The Third Circuit relied on *Phillips* in holding that the plan was "null and void" to the extent it purported to authorize termination outside ERISA's framework. *See id.* at 579-80. In *In re Esco Mfg. Co.*, 50 F.3d 315 (5th Cir. 1995), the Fifth Circuit held that a bankruptcy trustee lacked the power to order a plan termination outside the mechanism specified by ERISA, noting that "Congress intended [§ 1341] to 'provide the sole and exclusive means under which a qualified pension plan may be terminated.'" *Id.* at 316 (quoting H.R. Rep. No. 99-300, at 289 (1985)).[7]

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[7] Numerous other authorities — including the legislative history — agree that ERISA provides the exclusive means of plan termination. *See, e.g., Hall v. National Gypsum Co.*, 105 F.3d 225, 233 (5th Cir. 1997) ("ERISA contains detailed requirements that must be met before a Plan may be

(continued...)

Needless to say, these cases cannot be squared with the Ninth Circuit's decision to allow respondents to pursue the theory that the Plan was terminated in 1991 by operation of the common law.

Indeed, at the rehearing stage below, the PBGC submitted an *amicus curiae* brief challenging the Ninth Circuit's conclusion that a defined-benefit plan could be terminated other than by the exclusive means set forth in Title IV of ERISA. The agency stated that the decision below "strikes at the heart of the Title IV termination insurance program," PBGC Br. 2, because "[a]bsent compliance with the process Congress adopted for the termination of a covered plan, PBGC's program simply would not be manageable," *id.* at 3. That interpretation of the statute is reflected in the PBGC's regulation (entitled to judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)), that section 1341 is "the *exclusive* means of voluntarily terminating a plan." 29 C.F.R. § 4041.1 (emphasis added). The Ninth Circuit gave no explanation for its refusal to defer to the agency's position that there was no termination in this case as a matter of law.[8]

[7] (...continued)
terminated."); *PBGC v. Mize Co.*, 987 F.2d 1059, 1063 (4th Cir. 1993) ("The statutory provisions governing terminations of single-employer plans are exclusive."); *Chait v. Bernstein*, 835 F.2d 1017, 1020 (3d Cir. 1988) ("[W]e must look to ERISA itself to determine whether a termination has occurred"); H.R. Rep. No. 99-300, at 289 (1985) ("As under current law, the committee intends that ERISA provide the sole and exclusive means under which a qualified pension plan may be terminated.").

[8] The Ninth Circuit's opinion ignores the governing PBGC regulation, and instead cites a Treasury regulation, 26 C.F.R. § 1.401-6, that interprets a *pre-ERISA* provision of the Internal Revenue Code, *see id.* § 1.401-0(a). *See* App. 11a n.3. In response to Hughes' petition for rehearing, the Ninth Circuit majority deleted one reference to § 1.401-6, *see* App. 50a, 22a-23a, but continued to rely upon that obsolete regulation elsewhere in its opinion, *see id.* at 49a, 52a, 11a n.3.

If not reversed, the Ninth Circuit's termination holding would cause no end of mischief. It was hitherto unimaginable that a routine amendment to the benefit structure of a plan could possibly constitute a termination of the plan requiring the immediate distribution of the plan's assets. By holding that an amendment to a benefit feature can amount to a plan "termination," the decision below throws into chaos the routine operations of a wide array of benefit plans. Employers will be stymied in making sensible amendments to plans by the prospect of becoming caught up in protracted litigation over whether an amendment constitutes a "constructive termination" — litigation that, under the opinion below, cannot be resolved at the pleadings stage. Imposing such dire consequences on an employers' amendment of an employee-benefit plan runs contrary not only to ERISA's plain language, but also to Congress' intent to encourage such plans.

In short, if the Court does not summarily reverse the decision below, it should grant review of the Ninth Circuit's ruling that defined-benefit plans can be terminated by a nonstatutory means outside the exclusive means specified in ERISA.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of *certiorari*, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY I. JACOBSON; Daniel P. Welsh;
Robert E. McMillin; Ernest O. Blandin;
Richard E. Hook,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY; Hughes
Non-Bargaining Retirement Plan,

Defendants-Appellees.

No. 93-55392
D.C. No. CV-92-04020-RG

Appeal from the United States District Court
for the Central District of California
Richard A. Gadbois, Jr., District Judge, Presiding

Argued and Submitted Nov. 4, 1993 — Pasadena, California
Filed January 23, 1997

Before: Betty B. Fletcher, Harry Pregerson, and
William A. Norris, Circuit Judges.

Opinion by Judge Pregerson; Dissent by Judge Norris

OPINION

PREGERSON, Circuit Judge:

Plaintiffs appeal the district court's dismissal of their action brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et. seq. Plaintiffs are

retired Hughes Aircraft Company employees who are participants in the Hughes Non-Bargaining Retirement Plan (the "Contributory Plan"). Plaintiffs allege in their complaint that the employer, defendant Hughes Aircraft Company ("Hughes"), breached its statutory and fiduciary duties under ERISA when it used the Contributory Plan's surplus assets-attributable in part to employee contributions-to fund an early retirement program for existing employees and a *new* non-contributory pension plan for some employees that were not participants of the Contributory Plan. Plaintiffs seek a variety of remedies, including a distribution of "all or a portion of the excess Plan assets" in the form of increased benefits. The district court dismissed plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6), without leave to amend. The simple question before us is whether plaintiffs have alleged sufficient facts in their complaint to state *any* claim for relief under ERISA. Assuming plaintiffs can prove what they have plead in their complaint, we conclude their claims are cognizable. We, therefore, reverse.

FACTS

According to the complaint,[1] defendant Hughes is an aerospace and electronics manufacturing company. Since 1951, Hughes has provided a retirement pension plan for its employees. At issue in this litigation is the use by Hughes of surplus assets from the Contributory Plan.

The terms of the Contributory Plan provide, in relevant part, that both Hughes and its employees *must* contribute to the Plan. The employees' contributions are automatically deducted from their pay. By 1986, as a result of both employer and employee contributions and as a result of investment growth, the Contributory Plan's assets exceeded the actuarial or present value of accrued benefits by almost one billion dollars.

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[1] All information in this section is taken from the complaint.

Apparently, because of this surplus, and after being acquired by the General Motors Corporation, Hughes, in 1987, ceased making contributions to the Contributory Plan.[2] The employees, in contrast, despite the overfunding, were required to continue making contributions to the Contributory Plan. As of January 1, 1992, approximately half the surplus in the Contributory Plan was attributable to employee contributions and the other half to employer contributions.

In 1989, Hughes amended the Plan and used part of the asset surplus to provide an early retirement program for existing employees. According to plaintiffs, by offering this program, Hughes was able to reduce its workforce and save payroll costs.

Plaintiffs also allege in their complaint that Hughes terminated the Contributory Plan on January 1, 1991, when Hughes created a new defined benefit plan (the "Non-Contributory Plan") and froze new enrollment in the Contributory Plan. The new Non-Contributory Plan covers all new employees as well as those old employees who chose not to remain in the Contributory Plan.

Although created through an "amendment" to the Contributory Plan, the Non-Contributory Plan shares virtually no characteristics with the older plan, other than administration by the same trustees. The Contributory Plan is elective and requires monthly contributions by the employees. The Contributory Plan also provides health coverage, a cost of living adjustment, and unreduced early retirement benefits.

In contrast, the Non-Contributory Plan requires no employee contributions, and new employees are enrolled automatically. The new plan does not provide health coverage, cost of living adjustment, or unreduced early retirement

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[2] According to plaintiffs, at the time General Motors acquired Hughes, the General Motors retirement plan was underfunded by over seven billion dollars. In fact, the Pension Benefit Guaranty Corporation listed the GM plan as one of the most underfunded pension plans in the country.

benefits. In addition, the new plan pays lower monthly retirement benefits than the Contributory Plan, and the two plans use different formulas to compute benefits.

According to plaintiffs' complaint, Hughes used and continues to use the asset surplus generated by employee and employer contributions from the Contributory Plan to fund the new Non-Contributory Plan. Plaintiffs further allege that in so doing, Hughes is improperly using plan assets attributable in part to employee contributions for its own benefit.

Plaintiffs filed this class action in the United States District Court for the District of Arizona. The putative class consists of over 10,000 persons who were participants in the Contributory Plan on December 31, 1991. The court granted Hughes's motion to transfer venue to the Central District of California. Defendants filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(6). The district court granted the motion and dismissed plaintiffs' complaint without leave to amend. No discovery was ever taken in the district court.

ANALYSIS

A. Standard of Review

We review de novo a district court's dismissal of a complaint for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6). *Everest and Jennings v. American Motorists Ins. Co.*, 23 F.3d 226, 228 (9th Cir.1994) (citations omitted). We apply the same standard on appeal as the district court. *Id.* "It is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see* 5 C. Wright & A. Miller, Federal Practice & Procedure §§ 1202, 1205-1207, 1215-1224, 1228 (1969)." *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1979) (*emphasis added*).

The Supreme Court has consistently adhered to this standard. Most recently, in *Hartford Fire Ins. Co. v. California*, ___ U.S. ___, 113 S. Ct. 2891, 2916-17 (1993), Justice Scalia, who concurred in the Court's decision, stated that, although he disagreed with Justice Souter's analysis as to what constitutes a boycott, he agreed that the action should not be dismissed because "other allegations in the complaints describe conduct that *may* amount to a boycott if the plaintiffs can prove certain additional facts." *Id.* (emphasis added). Justice Scalia further noted that allegations in a complaint are to be "[l]iberally construed" at the 12(b)(6) stage. *Id.* at 2917.

Thus, a court's role at the 12(b)(6) stage is not to decide winners and losers or evaluate the strength or weakness of claims. *See Everest and Jennings*, 23 F.3d at 228; *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir.1990). Nor can a court resolve factual questions at the 12(b)(6) stage. We must accept as true the allegations in the complaint and decide *only* whether plaintiff has advanced *potentially* viable claims.

With this standard in mind, we now examine plaintiffs' claims in this action.

B. Plaintiffs' ERISA Claims

At the heart of this dispute is whether Hughes is entitled to use and control for its *own* benefit the Contributory Plan's one billion dollar surplus, approximately half of which was generated by employee contributions. This is *not* a case in which the pension plan at issue was funded entirely by employer contributions. Nor is this a case in which the employer used the plan's asset surplus *solely* to benefit participants of the plan. Because plaintiffs allege that the employer used the Contributory Plan's asset surplus attributable in part to employee contributions for its own benefit and for the benefit of employees who were never participants in the Contributory Plan, we conclude that plaintiffs have stated cognizable claims under ERISA.

First Claim

Plaintiffs' first claim alleges that Hughes violated ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1), which provides that "the

assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants of the plan." The term "inure" has been defined as "mean[ing] broadly to 'become of advantage to the employer.'" *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir.1985)(citing *Teamsters Local 639 v. Cassidy Trucking, Inc.*, 646 F.2d 865, 868 (4th Cir.1981)), *cert. dismissed*, 474 U.S. 1113 (1986).

The district court rejected plaintiffs' anti-inurement claim. We agree with the district court that Hughes did not violate § 1103(c)(1) by the mere fact that Hughes ceased its contributions to the Contributory Plan. The terms of the Contributory Plan require Hughes to contribute to the Plan only when necessary to ensure sufficient funding. ERISA does not require an employer to contribute to an overfunded plan. *See Fechter v. HMW Indus., Inc.*, 879 F.2d 1111, 1113 (3rd Cir.1989).

This, however, does not mean that Hughes can use the Contributory Plan's asset surplus for its own benefit and for the benefit of employees who were never participants in the Contributory Plan. Hughes did not do anything so blatant as to distribute the surplus to itself and to the new employees. Instead, Hughes twice "amended" the Contributory Plan to its own advantage and used the asset surplus attributable in part to plaintiffs' contributions to offer an early retirement program and the *Non*-Contributory Plan for existing and new employees. By so doing, plaintiffs allege, Hughes reduced its labor costs while effectively increasing new employees' wages. Thus we find that, based on plaintiffs' allegations, Hughes has taken advantage of the plan's asset surplus for its own benefit.

Hughes, however, contends that its "amendments" creating two new benefits structures under the Contributory Plan did not violate ERISA's anti-inurement provision, because Hughes was not acting as a fiduciary when it "amended" the plan. To support its contention, Hughes relies on the Supreme Court's recent decision in *Lockheed Corp. v. Spink*, ___ U.S. ___, 116 S.Ct. 1783 (1996).

In *Lockheed*, the Supreme Court held that amending an existing pension plan to use surplus assets to fund an early retirement program *for participants of the plan* does not violate ERISA, so long as other ERISA provisions are not violated. *Id.* at 1790 ("While other portions of ERISA govern plan amendments, *see, e.g.*, 29 U.S.C. § 1054(g) (amendment generally may not decrease accrued benefits); § 1085b (if adoption of an amendment results in underfunding of a defined benefit plan, the sponsor must post security for the amount of the deficiency), the act of amending a pension plan does not trigger ERISA's fiduciary provisions."). As the Supreme Court explained, generally "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries" under ERISA. *Id.* at 1789.

Lockheed, however, can be distinguished from this case. First, the Supreme Court in *Lockheed* did not address whether the early retirement program in that case violated ERISA's anti-inurement provision. Here, plaintiffs allege that Hughes improperly benefited from using plan assets. Second, the asset surplus that was used in *Lockheed* to fund the early retirement program was attributable *only* to employer contributions. Here, plaintiffs allege that the asset surplus Hughes used to fund the early retirement program and the new Non-Contributory Plan was attributable to *both* employer and employee contributions. Third, the early retirement program in *Lockheed* only benefited employees who were already participants in the existing pension plan. Here, some of the employees benefiting from the Non-Contributory Plan are new employees who were never participants in the Contributory Plan. Fourth, plaintiffs in *Lockheed* did not allege that the employer had terminated the pension plan. Here, plaintiffs allege that Hughes terminated the Contributory Plan when it froze new enrollment and created the Non-Contributory Plan. Lastly, the plaintiffs in *Lockheed* did not allege that the amendment resulted in the violation of

any other ERISA provisions. Here, plaintiffs allege that by using the asset surplus attributable in part to employee contributions Hughes reduced plaintiffs' accrued benefits and violated ERISA's vesting, nonforfeiture, and distribution requirements under 29 U.S.C. §§ 1053(a) and 1344.

Thus, *Lockheed* is of little help in determining whether Hughes's use of the Contributory Plan's asset surplus *attributable in part to employee contributions* violates ERISA. Even if we were to hold that under *Lockheed* Hughes's "amendments" in this case did not trigger its fiduciary obligations under ERISA, that does not mean that we must also hold that Hughes's conduct did not trigger ERISA's anti-inurement provision.

We have found no case which holds that the anti-inurement provision is only triggered when an employer is acting as a fiduciary. Nor can we reasonably interpret 29 U.S.C. § 1103(c)(1) as establishing such a requirement. Unlike other provisions under ERISA, *see, e.g.*, 29 U.S.C. § 1104 (specifically addressing fiduciary duties) and 29 U.S.C. § 1106 (specifically referring to a fiduciary), § 1103 makes no reference to fiduciaries or fiduciary obligations. Section 1103 refers only to employers, stating that "assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. § 1103(c)(1). Thus, we hold that under a plan reading of § 1103, Hughes's alleged conduct in this case triggers ERISA's anti-inurement provision, whether or not the alleged conduct implicates ERISA's fiduciary obligations.

The dissent, however, asserts that the fact that an asset surplus is attributable in part to employee contributions is irrelevant. According to the dissent, an employer has sole discretion as settlor to use an asset surplus attributable in part to employee contributions. We disagree.

Under ERISA, Congress specifically provided protections for assets attributable to employee contributions. Congress enacted 29 U.S.C. § 1053, which establishes minimum vesting and nonforfeiture requirements for accrued benefits derived from employee contributions. In addition, section 4404 requires that, upon a plan's termination, any residual assets attributable to employee contributions "shall be equitably distributed to the participants who made such contributions," after all liabilities have been satisfied. 29 U.S.C. § 1344(d)(3)(A).

It is clear from these provisions that Congress intended to distinguish between plan assets attributable solely to employer contributions from plan assets attributable in part to employee contributions. As the Fifth Circuit has explained:

> An entirely *employer* funded defined benefit plan pension trust is therefore more akin to a gratuitous trust so far as concerns surplus assets, *as to which ERISA so markedly distinguishes between those attributable to employer contributions* (thus suggesting that employer contributions are not a form of recontributed wages for such purposes). Where a gratuitous trust is fully performed without exhausting the trust estate, a resulting trust of the surplus is presumed to arise in favor of the settlor. RESTATEMENT (SECOND) OF TRUST § 430. This principle has been looked to in holding an employer entitled to surplus assets on termination of an *employer* funded defined benefit pension plan.

Borst v. Chevron Corp., 36 F.3d 1308, 1315 (5th Cir.1994) (emphasis added).

Thus, to ignore the distinction between a plan funded solely by employer contributions and a plan funded by both employer and employee contributions would eviscerate the protections provided to employees under ERISA with respect to their employee contributions. We, therefore, hold that, when both the employer and its employees contribute to a pension plan, the employer does not have sole discretion to use that part of a plan's asset surplus attributable to employee contributions.

Hughes, alternatively, argues, that even if plaintiffs are entitled to some portion of the asset surplus, the anti-inurement provision has not been triggered in this case because Hughes has not withdrawn or threatened to withdraw plan assets. Hughes relies on a Second Circuit decision, *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, in support of its position. *Amato* does not help Hughes. Like *Lockheed*, *Amato* involves an amendment to a *non*-contributory pension plan that reduced retirement benefits for a group of *participants* under an existing plan. As discussed above, this distinction is critical. While an employer may have the discretion to decide how to use an asset surplus attributable solely to *employer* contributions, so long as other provisions of ERISA are not violated, an employer does not have sole discretion to use a plan's asset surplus attributable in part to *employee* contributions to benefit itself and employees that were never participants in the plan. By its plain language, the anti-inurement provision requires that plan assets must "*never* inure to the benefit of any employer" and must be used "for the *exclusive* purposes of providing benefits *to participants* of the plan." 29 U.S.C. § 1103(c)(1) (emphasis added).

Further, to affirm the district court's dismissal on the ground that under *Amato* plan assets were never withdrawn in this case would require us to resolve disputed issues of fact. We would have to conclude that no termination has occurred and that only one plan exists. We, however, cannot resolve factual issues on a motion to dismiss.

In ruling on a 12(b)(6) motion, plaintiffs' allegations must be taken as true. Here, plaintiffs allege that by "amending" the Contributory Plan to freeze its enrollment and to create a separate Non-Contributory Plan for new employees, Hughes, in effect, terminated the Contributory Plan and "withdrew" the surplus assets for its own use and for the benefit of some employees who were never participants in the Contributory

Plan.[3] If in fact plaintiffs can prove that two separate plans exist and that Hughes's amendment terminated the Contributory Plan, Hughes's withdrawal of assets from the

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[3] Plaintiffs contend that Hughes's conduct here amounts to a constructive termination based on what one circuit has called the dry or wasting trust theory under the law of trusts. *See In re Gulf Pension*, 764 F.Supp. 1149, 1202 (S.D.Texas 1991), *aff'd sub nom*, *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994). The Supreme Court recently approved of courts looking to trust principles to construe ERISA provisions. *Varity Corp. v. Howe*, ___ U.S. ___, ___, 116 S.Ct. 1065, 1070, 134 L.Ed.2d 130 (1996). As the Supreme Court stated, "[ERISA's] fiduciary duties draw most of their content from the common law of trust, the law that governed most benefit plans before ERISA's enactment." *Id.* *See also In re Gulf*, 764 F.Supp. at 1202 ("[r]esort to the common law of trusts is . . . consistent with the underlying purpose of ERISA, which is rooted on the common law of trusts").

~~Because ERISA does not define when a termination occurs, we believe it is appropriate for a court to look to trust principles to determine when a termination occurs.~~ Under the common law of trusts, "[o]nce the object of the settlor had been achieved, the trust was deemed to end since its continuation would be useless and might frustrate the intent of the settlor [as] to a beneficiary or remainder interest." *In re Gulf*, 764 F.Supp. at 1202. See *also Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir.1987) (holding that under the law of trusts any remaining assets after a trust's purpose has been fulfilled becomes "a 'resultant trust' for the benefit of the creator of the original trust . . . *by operation of law* unless he manifested a contrary intent").

We find plaintiffs allegations in this case-that Hughes's conduct in freezing enrollment in the Contributory Plan and creating the Non-Contributory Plan for existing and new employees converted the Contributory Plan into a wasting trust-to be sufficient to survive a 12(b)(6) motion. ~~The question of when a termination occurs is a mixed question of law and fact.~~ *See* 26 C.F.R. § 1.401-6(b)(1) ("whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case").

To resolve this question, the record in this case must be further developed. Only after discovery can the district court properly determine whether the Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan. *See In re Gulf*, 764 F.Supp. at 1202-1203. Such a determination may require the help of experts.

Contributory Plan to create and fund the new Non-Contributory Plan for the benefit of some employees who were never participants in the Contributory Plan violated ERISA's anti-inurement provision.[4]

Hughes, however, contends that any benefit it receives from using the surplus assets of the Contributory Plan is an "incidental side effect," insufficient as a matter of law to state a claim under the anti-inurement provision. *Holliday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.1984), *cert. denied*, 469 U.S. 917 (1984). We reject this contention.

Whether Hughes gains an "incidental" economic benefit from being able to buy out its older employees through an early retirement program and by being able to offer new employees a pension plan that requires no employee contributions is a question of fact we cannot resolve on a 12(b)(6) motion. To resolve this factual question, we would have to look beyond the

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[4] Even if we were to conclude as a matter of law that no termination has occurred here, we find that plaintiffs could still amend their complaint to allege a different theory of recovery. As the Seventh Circuit recently noted in a case involving an employer's decision to amend a pension plan to use surplus assets to increase the benefits of current employee participants without increasing the pension benefits of retired participants:

> A transaction of this kind would reduce the expected value of the benefits. Writing additional promises without increasing the assets available to fund those promises increases the risk that at some time in the future-if, perhaps the economy takes a downturn and . . . [the employer] is unable to top up the plan-the trust will be unable to satisfy all of its obligations . . . . [thus] increas[ing] the risk of non-payment.

Johnson v. Georgia-Pacific Corp., 19 F.3d 1184, 1187 (7th Cir.1994). The Supreme Court in *Lockheed* also recognized that "commercial bargains that present a special risk of plan underfunding" are the kind of transactions that ERISA was intended to prohibit. 116 S. Ct. at 1971.

In this case, it could very well be that by depleting the Contributory Plan's asset surplus Hughes increased the risk of the Contributory Plan's underfunding. Only through discovery, however, will plaintiffs know whether the expected value of their benefits has been reduced.

allegations in the complaint. This, we cannot do. We reiterate that on a 12(b)(6) motion we must take as true each allegation in plaintiffs' complaint and draw all reasonable inferences in favor of plaintiffs.

Based on the liberal 12(b)(6) standard, we believe that plaintiffs' allegations are sufficient to state a claim under ERISA's anti-inurement provision. Hughes, in effect, remained competitive in the labor market by using the asset surplus, created in part by employee contributions, to reduce its labor costs and to increase new employees' wages. Had Hughes not used the Contributory Plan's surplus, Hughes would have had to use its own revenues or offered fewer benefits to its new employees. We cannot say at the 12(b)(6) stage that Hughes's alleged benefit is an "incidental side effect" that does not violate ERISA's anti-inurement provision.

Second Claim

Plaintiffs' second claim alleges that Hughes breached its fiduciary duties under ERISA § 404, 29 U.S.C. § 1104, by using the Contributory Plan's surplus assets to fund the Non-Contributory Plan for some employees that never were participants in the Contributory Plan. Section 1104 requires that a fiduciary "discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and (A) for the *exclusive* purpose of: (i) providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(A)(1) (emphasis added). The complaint, by alleging that Hughes is using funds attributable to their employee contributions to fund a new plan for some employees who were never participants in the Contributory Plan, states a valid claim for relief.

Hughes, however, contends that its conduct did not violate ERISA's § 1104. Hughes maintains that it was not acting as a fiduciary when it "amended" the Contributory Plan to use the asset surplus. According to Hughes, an employer, as settlor, can change a plan's structure at any time, for whatever reason, and for anyone's benefit without implicating its fiduciary duties under ERISA.

The district court agreed. The district court concluded that Hughes's decision to amend the Contributory Plan to provide for asset surplus reversion to itself was a plan design decision that did not implicate ERISA's fiduciary obligations, regardless of the fact that the asset surplus was attributable in part to employee contributions and used to benefit some employees who were never participants in the Contributory Plan. The district court was wrong.

As discussed above, based on our reading of the relevant ERISA provisions, we hold that, when an employer is not the sole contributor of a pension plan, the employer does not have sole discretion to use the asset surplus of the plan. If employees contribute to the plan, the employer has a fiduciary duty to the employees when it amends the plan to use an asset surplus. In essence, when a plan is funded by both employer and employee contributions, both the employer and the employees are *co*-settlors of the plan.

The recent Supreme Court decisions construing ERISA's fiduciary provisions do not dictate otherwise. *See Lockheed Corp. v. Spink*, 116 S. Ct. 1783; *Varity Corp. v. Howe*, 116 S.Ct. 1065. It is true that in *Lockheed*, the Supreme Court held that an amendment to a plan to provide an early retirement program for existing employees did not trigger ERISA's fiduciary obligations because "[w]hen employers undertake those actions, . . . they do not act as fiduciaries, . . . but are analogous to the settlors of a trust." 116 S.Ct. at 1789. But as discussed above, the employer in *Lockheed* was the *sole* contributor of the plan and used the plan's surplus *only* to benefit the plan's participants. Here, plaintiffs allege that Hughes used the Contributory Plan's surplus assets attributable in part to employee contributions for Hughes's own benefit and for the benefit of some employees who were never participants in the Plan.

Thus, we cannot say that Hughes was simply acting like a settlor of a trust when it "amended" the plan to fund the Non-Contributory Plan for existing and new employees. We

hold that, when an employer amends a plan to use for its own benefit an asset surplus attributable in part to employee contributions, the employer is wearing both its "fiduciary" and its "employer" hats. *See Varity*, 116 S.Ct. at 1073 ("reasonable employees, in the circumstances found by the District Court, could have thought that Varity was communicating with them *both* in its capacity as employer *and* in its capacity as plan administrator").

In *Varity*, the Supreme Court construed 29 U.S.C. § 1002(21)(A), which provides that a person acts as "a fiduciary with respect to a plan to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or he has any discretionary authority or discretionary responsibility in the administration of such plan." The Supreme Court held that this definition "limit[s] the scope of fiduciary activity to discretionary acts of plan 'management' and 'administration.'" 116 S.Ct. at 1072-1073.

The Supreme Court also looked to trust law to construe the meaning of "fiduciary" and trust "administration." As the Supreme Court observed:

> The ordinary trust law understanding of fiduciary "administration" of a trust is that to act as an administrator is to perform the duties imposed, or exercise the powers conferred, by the trust documents. . . . The law of trusts also understands a trust document to implicitly confer "such powers as are necessary or appropriate for the carrying out of the purposes" of the trust.

Id. at 1073. Further, the Supreme Court stated:

> There is more to plan (or trust) administration than simply complying with the specific duties imposed by the plan documents or statutory regime; it also includes the activities that are "ordinary and natural means" of

> achieving the "objective" of the plan. . . . Indeed, the primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.

Id. at 1073-1074.

Under *Varity*, therefore, the question we must answer is whether Hughes was carrying out discretionary functions relating to plan management and administration when it "amended" the plan to use surplus assets attributable in part to employee contributions.

We answer this question affirmatively, and conclude that, based on the allegations in plaintiffs' complaint, Hughes was acting as a fiduciary when it "amended" the plan. There is no question that Hughes's amendment triggered ERISA's statutory duties with respect to assets attributable to employee contributions. In addition, because Hughes was disposing of the plan's assets when it amended the plan, Hughes's amendment necessarily affected the management and administration of the plan. Further, the use of surplus assets from one plan to fund another plan that benefits new employees who were never participants in the first plan may increase the risk of underfunding and non-payment.

Hughes, however, contends that there can be no violation of the exclusive benefit rule under 29 U.S.C. § 1104 because only one plan and one group of employees exist in this case. To adopt Hughes's contention at the pleading stage, we would have to disregard plaintiffs' allegations in the complaint that two separate pension plans exist and that the new employees benefiting from the Contributory Plan's asset surplus never were participants in the Contributory Plan. Because we must take as true all of the allegations plaintiffs make in their

complaint, we find that plaintiffs' allegations are sufficient to overcome a dismissal under 12(b)(6).

A Seventh Circuit case, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir.1994), does not persuade us otherwise. In *Johnson*, the employer, GNN, amended the company pension plan to provide increased benefits to active workers and thereby deter a hostile takeover. After GNN was acquired, the surplus from the pension plan was distributed in the form of increased wages to the active employees. The retired workers brought suit, alleging that GNN breached its fiduciary duties under ERISA by not also increasing their benefits. The Seventh Circuit found that the district court properly dismissed the retirees' claims.

The instant case presents a fundamentally different scenario. Like the employer in *Lockheed*, the employer in *Johnson* chose to give an extra benefit to one group of employees within a larger group, all of whom were participants in the same plan. *Id.* at 1186-1187. There was *no* allegation in *Johnson* that the employer transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants of the plan. *Id.* at 1189. The Seventh Circuit found that, even though it favored one group of employees over others, GNN was still exercising its duties in the sole interest of the plan participants. *Id.* at 1187.

Here, we cannot say that when Hughes "amended" the plan to use the asset surplus it was "managing" or "disposing of" plan assets for the *sole* benefit of participants in one plan. *Id.* at 1189. Plaintiffs allege in their complaint that the Contributory Plan was terminated and that the new Non-Contributory Plan benefited some employees who were never participants in the Contributory Plan. Based on these allegations, we find that when Hughes used the Contributory Plan surplus to create and fund the Non-Contributory Plan, Hughes was managing and disposing of plan assets within the meaning of ERISA. Assuming that plaintiffs can prove their allegations, we conclude that Hughes's conduct implicated its

fiduciary duties under ERISA. Plaintiffs, therefore, have stated a claim for relief under § 1104 of ERISA.

Third Claim

Plaintiffs' third claim alleges that Hughes violated ERISA § 203, 29 U.S.C. § 1053(a), by using vested, nonforfeitable benefits to meet Hughes's obligations to fund the Contributory and Non-Contributory Plans. Plaintiffs allege that, by depleting the surplus to fund the Non-Contributory Plan, Hughes, in effect, forfeited plaintiffs' accrued benefits derived from employee contributions. Plaintiffs contend that under ERISA employees are entitled to accrued benefits traceable to their own contributions, even if the amount of such benefits exceeds the defined benefits under the plan. We agree that, if employees' own contributions and the income their contributions generate exceed the defined benefit amount under the plan, ERISA requires that employees be paid the larger amount.

Section 1053 establishes minimum vesting and nonforfeiture requirements for all pension plans, providing, in relevant part:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is *nonforfeitable* upon the attainment of normal retirement age *and in addition* shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> > (1) A plan satisfies the requirements of this paragraph *if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable*.
>
> . . . .

29 U.S.C. § 1053(a)(1). Paragraph (2) establishes the vesting requirements for an employee's accrued benefit derived from employer contributions. The vesting requirements for employer contributions are not at issue in this case.

To determine the amount of accrued benefits under paragraph (1), we look to § 1054(c)(2)(B), which defines the "accrued benefit derived from contributions made by an employee" as the employee's "accumulated contributions expressed as an annual benefit commencing at normal retirement age." Section 1054(c)(2)(C), in turn, defines "accumulated contributions" to include the employee's mandatory contributions *plus* appropriate interest. Further, 29 U.S.C. § 1002(23) provides that "[t]he accrued benefit of an employee *shall not be less* than the amount determined under section 1054(c)(2)(B) of this title with respect to the employee's accumulated contribution." (Emphasis added.)

A plain reading of these ERISA provisions makes clear that plaintiffs are entitled to more than the amount of defined benefits under the plan if that amount *is less* than the accrued benefits derived from their mandatory employee contributions. In other words, § 1053 establishes a floor with respect to mandatory employee contributions: the amount of accrued benefits cannot fall below the amount of accrued benefits derived from employee contributions. If it does, the employer violates the minimum vesting and forfeiture requirements of 29 U.S.C. § 1053.

As the Supreme Court has stated, "the concepts of vested rights and nonforfeitable rights are critical to the ERISA scheme." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1980). "One of the primary purposes of the Act is to insure that plan participants do not lose vested benefits because of 'unduly restrictive' forfeiture[s]." *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 449 (9th Cir.1980).

Thus, by establishing minimum vesting and pay-out requirements for *all* pension plans under section 1053, Congress gave employees *nonforfeitable* rights to their vested benefits. A "nonforfeitable" right is defined under ERISA as " 'a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is

unconditional, and which is *legally enforceable* against the plan.'" 29 U.S.C. § 1002(19) (emphasis added). In construing this definition, the Supreme Court has stated that "[i]t is therefore surely consistent with the statutory definition of 'nonforfeitable' to view it as describing the quality of the participant's right to a pension *rather* than a limit on the amount he may collect." *Alessi*, 451 U.S. at 512 (quotations and citations omitted) (emphasis added).

Hughes maintains that the forfeiture requirements apply only upon termination, which, according to Hughes, has not occurred here. Hughes, however, cites no cases to support its assertion that the forfeiture requirements are triggered only upon termination. Nor is such an interpretation supported by the language of 29 U.S.C. § 1053. This section does not mention termination, nor does it reference 29 U.S.C. § 1344(d)(2), which requires the equitable distribution of residual plan assets attributable to employee contributions upon the termination of a plan.

Hughes further argues that in a defined benefit plan accrued benefits attributable to employee contributions can be forfeited where a surplus exists. In support of its position, Hughes quotes a passage from *Hummell*, which states that "nothing in ERISA prohibits 'a plan's providing for forfeiture of benefits when the affected benefits are in excess of the minimum vesting requirements of 29 U.S.C. § 1053.'" 634 F.2d at 450.

This passage does not help Hughes. In *Hummell*, the accrued benefits at issue were attributable *only* to *employer* contributions. We held that the forfeiture in *Hummell* did not violate ERISA's minimum vesting requirements because the accrued benefits all from employer contributions *exceeded* the minimum vesting requirements under 29 U.S.C. § 1053(a).[5]

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[5] *See also Lojek v. Thomas*, 716 F.2d 675, 679 (9th Cir.1983) (holding that where employer complies with minimum vesting requirements, "ERISA does not prohibit forfeiture of non-vested benefits in excess of the minimum vesting requirements"); *Fentron Industries v. National Shopmen Pension*

Therefore, *Hummell's* holding, which allows an employer to forfeit benefits in excess of the minimum vesting requirements when *all* the benefits derive from employer contributions, cannot be extended to situations where, as here, a portion of the surplus assets are attributable to employee contributions. By statutory definition, employees are vested in their own contributions and the income generated therefrom.

As discussed above, plaintiffs in this case allege that Hughes is using accrued benefits that are protected by ERISA's minimum vesting and nonforfeiture requirements. Because such benefits are attributable to employee contributions and thus nonforfeitable under 29 U.S.C. § 1053(a), Hughes's alleged forfeiture may violate ERISA.[6] Even if we were to concede for purposes of argument that section 1053 is triggered only upon termination,[7] we must still reverse the district court because the complaint alleges that a termination has occurred. Plaintiffs, therefore, have stated a claim for relief under 29 U.S.C. § 1053.[8]

Fund, 674 F.2d 1300, 1306 (9th Cir.1982) (holding that "pension plan may cancel benefits not required by ERISA's minimum vesting requirements").

[6] Whether plaintiffs in this case are actually entitled to more than the defined benefit amount under the plan requires calculations that raise issues of fact which we cannot decide at the pleading stage.

[7] Termination would not be the only triggering event. Fiduciary obligations of Hughes as trustee would preclude actions short of termination that would threaten compliance with 29 U.S.C. § 1002(23), which requires that an employee's accrued benefit "shall not be less than the amount determined under 1054(c)(2)(B) . . . with respect to the employee's accumulated contributions" derived from employee contributions.

[8] Nothing the Supreme Court said in *Lockheed* and *Varity* affects our analysis of plaintiffs' claim under 29 U.S.C. § 1053. Neither *Lockheed* nor *Varity* construed ERISA minimum vesting and forfeiture requirements. In fact, the Supreme Court in *Lockheed* specifically noted that "there is no claim in this case that the amendments resulted in any violation of the participation, funding, or vesting requirements of ERISA." 116 S. Ct. at 1790 n. 5.

Fourth Claim

Plaintiffs' fourth claim alleges that Hughes violated ERISA § 4404, 29 U.S.C. § 1344, which addresses the allocation of assets when an employer terminates a plan. Section 1344(d)(3)(A) requires that any residual assets attributable to employee contributions that remain after all liabilities have been satisfied "shall be equitably distributed to the participants who made such contributions." *Id.* Further, § 4404(d)(1) provides that an employer may cause reversion of excess assets to itself only if "(A) all liabilities of the plan to the participants and their beneficiaries have been satisfied, (B) the distribution does not contravene any provision of law and (C) the plan provides for such a distribution." *Id.*

The complaint alleges that Hughes terminated the Contributory Plan when it froze enrollment in the Contributory Plan and created the Non-Contributory Plan for new employees without equitably distributing the surplus attributable to the employee contributions. The complaint further alleges that the Contributory Plan does not contain a provision for reversion of excess assets upon termination. Based on these allegations, we find that plaintiffs stated a claim under § 1344.

~~In determining whether a plan has been terminated, courts must look to "all the facts and circumstances in a particular case." 26 C.F.R. § 1.401-6(b)(1). *See also Borst*, 36 F.3d at 1313 n. 9. Under the applicable regulations, the Department of the Treasury has construed termination to "include[ ] both a partial termination and a complete termination of a plan." *Id.* at § 1.401-6(b)(2). Examples of when a termination may occur include: (1) an employer beginning to discharge employees in connection with winding down a business; (2) an employer replacing a plan with a non-comparable plan; (3) an employer amending the plan to exclude a group of employees who were formerly covered by the plan; (4) an employer changing the eligibility and vesting requirements under the plan; or (5) an employer reducing or eliminating its contributions to the plan. *Id.* at § 1.401-6(b). *See also In re Gulf*, 764 F.Supp. at 1202~~

~~(finding constructive termination by applying wasting trust principles to ERISA context).~~

Assuming that plaintiffs can prove that Hughes terminated the Contributory Plan, ERISA would require Hughes to equitably distribute to employees the surplus assets attributable to employee contributions. *See, e.g., Bridgestone/ Firestone v. Pension Benefit Guaranty Corp., et al.*, 892 F.2d 105 (D.C. Cir. 1990) (holding that employer required to return surplus attributable to employee contributions under § 1344 upon termination of defined benefit plan). Thus, we conclude that plaintiffs have stated a claim under § 1344.

Fifth Claim

Plaintiffs' fifth claim alleges that the defendants breached their fiduciary duties under 29 U.S.C. § 1106(a)(1)(D), which prohibits the "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." The complaint alleges that the Contributory Plan and the Non-Contributory Plan are two different plans, and that transferring funds from one to the other is prohibited by ERISA.

The district court dismissed the fifth claim by finding that only one plan exists in this case. As discussed above, the district court erred in making this finding because it contradicts plaintiffs' allegations in the complaint. As we stated above, courts are not supposed to resolve questions of fact on a 12(b)(6) motion. Even assuming that only one plan exists, we still find that plaintiffs' allegations are sufficient to state a claim under § 1106(a)(1)(D). *See Cutaiar v. Marshall*, 590 F.2d 523, 529 (3rd Cir.1979) ("[w]hen identical trustees of two employee benefit plans whose participants and beneficiaries are not identical effect a loan between the plans without a[n] . . . exemption, a per se violation of ERISA exists").

As we discussed above, Hughes was acting as a fiduciary when it "amended" the Contributory Plan to use surplus assets attributable to plaintiffs' employee contributions. As a fiduciary, Hughes was prohibited under § 1106(a)(1)(D) from

using the asset surplus attributable to employee contributions for its own benefit and for the benefit of new employees who were never participants in the plan.

Although the Supreme Court held in *Lockheed*, that "payment of benefits to plan participants and beneficiaries pursuant to terms of an otherwise *lawful* plan is wholly outside the scope of" § 1106(a)(1)(D), the Supreme Court also recognized that "commercial bargains that present special risk of plan underfunding" or that "involve uses of plan assets that are potentially harmful to the plan" are the kind of transactions prohibited under § 1106(a)(1)(D). 116 S.Ct. at 1790-1791. Indeed, the Supreme Court in *Lockheed* qualified its holding that requiring employees to release all employment- related claims against the employer in exchange for benefits under an early retirement program did not violate ERISA's fiduciary obligations by noting that there was no claim in *Lockheed* that the employer's "amendments resulted in any violation of the participation, funding or vesting requirements of ERISA." *Id.* at 1790 n. 5. Thus, the Supreme Court in *Lockheed* suggested that, where there is an allegation that payment of benefits is "a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme," such allegation is sufficient to state a claim under § 1106(a)(1)(D). *Id.* at 1792 n. 8.

Reading the complaint as a whole and drawing all reasonable inferences in favor of plaintiffs, we find that plaintiffs' allegations also support a claim for relief under the "sham transaction" theory recognized in *Lockheed*. In essence, plaintiffs allege that Hughes's "amendment" of the Contributory Plan was a sham transaction used to accomplish the unlawful transfer of the Contributory Plan's asset surplus attributable to employee contributions. The alleged transfer may be unlawful because, under the anti-inurement and nonforfeiture provisions, Hughes was prohibited from using the asset surplus attributable in part to employee contributions for its own benefit and the benefit of new employees who were

never participants in the Contributory Plan. Assuming that plaintiffs can prove that Hughes's "amendment" resulted in an unlawful use of plan assets, we find that Hughes's alleged conduct constitutes a prohibited transaction under 29 U.S.C. § 1106(a)(1)(D).

Sixth Claim

Plaintiffs' sixth claim alleges that the defendants violated ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), which provides that the plan fiduciaries must carry out their duties "in accordance with the documents and instruments governing the plan." According to plaintiffs, Hughes used Contributory Plan assets to provide eligible employees with an early retirement program. Plaintiffs contend that the early retirement program offered benefits in a discriminatory manner to only a select group of participants in violation of Article V, § 5.2 of the Plan. This section provides that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan."

Although the Supreme Court in *Lockheed* held that using surplus assets attributable solely to employer contributions to fund an early retirement program does not violate ERISA, this holding does not mean that the use of plan assets *attributable to employee contributions* to fund an early retirement program also does not violate ERISA. As discussed above, we do not think that an employer can unilaterally decide to use plan assets attributable to employee contributions without implicating ERISA's fiduciary obligations. Whether Hughes's conduct in this case actually violated the provisions of the plan raises questions of fact which we cannot resolve on a 12(b)(6) motion. Thus, we find that plaintiffs have stated a claim under 29 U.S.C. § 1104.

C. Procedural Errors

Plaintiffs additionally argue that the Arizona district court abused its discretion by transferring the action to the Central District of California. We review a district court's decision to transfer an action pursuant to 28 U.S.C. § 1404(a) for an abuse of discretion. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir.1987), *cert. denied*, 485 U.S. 993 (1988).

Plaintiffs correctly note that a plaintiff's choice of forum is accorded great deference in ERISA cases. *See Dugan v. M & W Trucking, Inc.*, 727 F. Supp. 417, 419 (N.D. Ill. 1989). However, this deference is one of several factors a court must consider when ruling on a motion to transfer venue. Under *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.1986), the district court must consider: (1) the relative convenience of the selected forum and the proposed forum; (2) the possible hardship to the plaintiff if the court grants the motion; (3) the interests of justice; and (4) the deference to be accorded the plaintiffs' choice of forum. In applying these factors to the instant case, we cannot say that the Arizona district court abused its discretion in concluding that a transfer of venue was proper.

Finally, plaintiffs argue that after the case was transferred to California, it was wrongly reassigned to Judge Gadbois. The case was initially assigned to Judge Consuelo Marshall, but was transferred to Judge Gadbois because it allegedly presented issues similar to those in another case previously heard by him. Plaintiffs contend that the instant case did not qualify as a "related case" transfer. While it may be that the instant case has little in common with the prior case, we are required to accord broad deference to a court's interpretation of its local rules. *See United States v. Mouzin*, 785 F.2d 682, 695 (9th Cir.1986), *cert. denied sub nom., Carvajal v. United States*, 479 U.S. 985 (1986). The district court did not abuse its discretion in transferring this case from Judge Marshall to Judge Gadbois.

CONCLUSION

The district court erred in dismissing plaintiffs' complaint under rule 12(b)(6). Neither the district court nor the dissent applied the 12(b)(6) standard correctly. At the pleading stage before discovery, all allegations must be liberally construed and taken as true, and all inferences must be drawn in favor of the plaintiff. Applying this standard, we conclude that this complaint alleges cognizable causes of action under ERISA. We, therefore, reverse and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

NORRIS, Circuit Judge, dissenting:

Plaintiffs-appellants are five retired Hughes Aircraft Company employees who are receiving retirement benefits under the Hughes Non-Bargaining Retirement Plan (the "Plan" or "Hughes Plan").[1] The five plaintiffs are among the 10,000-plus Hughes employees and retirees participating in the Plan. The principal relief plaintiffs seek is a termination of the Hughes Plan and a distribution of its assets to participants, such as the plaintiffs, who have made contributions to the Plan.

Plaintiffs allege that, largely as a result of "investment growth," Plan assets grew to the point that they exceeded the actuarially projected value of Plan liabilities by approximately $1 billion. In the event that plaintiffs succeed in their quest for a judgment terminating the Plan, ERISA provides for an equitable distribution of the Plan assets to those participants who have contributed to the Plan. Thus, if the Plan is terminated, plaintiffs will receive not only the defined pension benefits which they are currently receiving, but also a share of the $1 billion surplus. That is the pot of gold at the end of the rainbow that drives this litigation.

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1 The plaintiffs seek to represent a class "consisting of all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan." Compl. ¶ 10.

First Claim: Anti-Inurement

In their first claim for relief, plaintiffs contend that Hughes violated ERISA's so-called anti-inurement provision, ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1),[2]

> by utilizing excess Plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of plaintiffs and the class they represent.

Compl. ¶ 32. The plaintiffs' anti-inurement claim is based on two independent theories. First, they allege that when the Plan accumulated "excess assets," Hughes stopped making contributions to the Plan. As a result, plaintiffs contend, Hughes used Plan assets for its own benefit in violation of § 403(c)(1).

This claim is meritless.[3] As the district court correctly noted, the Plan itself imposes an obligation on Hughes to contribute *only* when necessary to ensure that the Plan is actuarially sound, i.e., sufficiently funded to meet projected liabilities. Judgment, filed Feb. 9, 1993, at ¶ 5(c). Section 3.1 of the Plan provides that:

> The cost of Benefits under the Plan, to the extent not provided by contributions of Participants . . . shall be provided by contributions of [Hughes] not less than in such amounts, and at such times, as the Plan Enrolled Actuary shall certify to be necessary, to fund Benefits

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[2] ERISA § 403(c)(1) provides in relevant part:

> [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. § 1103(c)(1).

[3] The majority agrees. However, of all the plaintiffs' varied claims regarding the $1 billion surplus, this is the only one that the majority finds meritless.

> under the Plan in accordance with the actuarial assumptions selected by such Actuary from time to time. . . .

In addition, section 6.2 of the Plan allows Hughes to "suspend" contributions unless it would thereby cause an "accumulated funding deficiency."[4]

ERISA does not require an employer to continue making contributions to an adequately funded plan. In *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111 (3d Cir. 1989), the court noted that, although employees were required to continue making contributions,

> [e]mployer contributions were made only when necessary to keep the Fund actuarially sound, *i.e.*, sufficiently funded. Because the Plan was overfunded, [the employer] did not have to make any contributions for the last five plan years.

Id. at 1113; *see also LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 302 (8th Cir.1983) (noting that terms of pension plan required employee participants to contribute six percent of salary, but required employer to contribute only as much as necessary to fund actuarially determined benefits). The logic underlying this rule was explained in *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir.1994):

> Pension law covers bad times as well as good times. In bad times (when declines in the value of assets make plans underfunded) employers must contribute more.

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[4] "Accumulated funding deficiency" is defined in ERISA as

> the excess of the total charges to the funding standard account for all plan years (beginning with the first plan year to which [ERISA] applies) over the total credits to such account for such years or, if less, the excess of the total charges to the alternative minimum funding standard account for such plan years over the total credits to such account for such years.

ERISA § 302(a)(2), 29 U.S.C. § 1082(a)(2).

If in good times employers were required to distribute the surplus to retirees on the theory that they "owned" that value, outcomes would be asymmetric. Employers would be liable for shortfalls but could reap no benefit from surpluses.

The plaintiffs' second anti-inurement theory is that Hughes violated § 403(c)(1) when it amended the Plan in 1991 to add a non-contributory benefit structure. Before this amendment, the Plan operated exclusively through a contributory benefit structure. In other words, under the pre-1991 Plan, all participants were required to make contributions to the Plan fund. Under the non-contributory benefit structure added by the 1991 amendment, participants would not be required to make contributions to the fund but they would receive lesser pension benefits than under the contributory structure. Under the 1991 amendment, existing employees were free to choose between the two benefit structures. Thus, the choice given existing employees was between (1) making contributions and receiving the higher level of defined benefits available under the contributory benefit structure; or (2) making no contributions and receiving lesser benefits under the non-contributory structure. New employees who enrolled in the Plan after the effective date of the 1991 amendment were required to enroll in the non-contributory benefit structure. The 1991 amendment had no effect on the rights of Plan participants, such as the plaintiffs, who had already retired and were already receiving their pensions as defined by the Plan. At all times, Plan benefits were paid out of a single fund, and Hughes' obligation to assure that the Plan was adequately funded remained constant after the 1991 amendment.

Nonetheless, plaintiffs argue that Hughes acted for its own benefit by using assets from the "contributory plan" to discharge its obligation to fund benefits under the "non-contributory plan." This argument is meritless. The 1991 amendment did not create a separate pension plan; it merely

added an alternative benefit structure under the existing Plan.[5] In amending the Plan to add the non-contributory benefit structure, Hughes acted in its capacity as a settlor, not as a fiduciary. It is well-settled that an employer's decision to amend a pension plan is an exercise of plan design, which does not implicate the employer's fiduciary duties. This principle was recently confirmed in *Lockheed Corp. v. Spink*, 116 S.Ct. 1783, 1789 (1996) ("When employers [adopt, modify, or terminate a pension plan], they do not act as fiduciaries, but are analogous to the settlors of a trust.") (citations omitted); *see also Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir.1995) ("Virtually every circuit has agreed that . . . an employer may decide to amend an employee benefit plan without being subject to fiduciary review."); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir.1990) ("[A]n employer's decision to amend or terminate an employee benefit plan is unconstrained by the fiduciary duties that ERISA imposes on plan administration."); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir.1986) (employer's decision to terminate pension plan was a business decision that did not implicate fiduciary duties under ERISA). As a plan settlor, Hughes "decide[s] who receives pension benefits and in what amounts, select[s] levels of funding, adjust[s] myriad other details of pension plans, and may decide to terminate the plan altogether." *Johnson*, 19 F.3d at 1188. Having these powers, Hughes also has the lesser included power to add a new benefit structure to an existing plan. Cf. *Hickerson v. Velsicol Chem. Corp.*, 778 F.2d 365 (7th Cir.1985), *cert. denied*, 479 U.S. 815 (1986) (holding that conversion from defined contribution, profit-sharing plan to defined-benefit plan did not violate ERISA); Treas. Reg. § 1.414(l)-1(b)(1)(i), 26 C.F.R. § 1.414(l)-1(b)(1)(i) (1995) (providing that, for income tax purposes, pension plan will be considered as "single plan" even if "plan has several distinct benefit structures"). Thus,

[5] Exhibits "A" and "B" to the Plan set forth provisions specific to the contributory and non-contributory benefit structures, respectively.

Hughes' use of Plan assets to fund benefits under the non-contributory benefit structure is unobjectionable under ERISA.

Although plaintiffs' theory is less than clear, they seem to be arguing that under § 403(c)(1), Hughes may not use fund assets to pay benefits to Plan participants enrolled under the non-contributory structure as long as a surplus exists, i.e., as long as the Plan is overfunded. Plaintiffs' rationale is that they are entitled to a share of the surplus because it is attributable at least in part to the investment growth on their contributions. This argument has no merit whatsoever. The existence of a surplus does not and cannot possibly serve as a basis for claiming that Hughes violated § 403(c)(1) by paying pension benefits out of fund assets. Using fund assets to pay pension benefits to Plan participants is not only allowed under the anti-inurement provision, it is *required*. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) ("[T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.").

Whether or not a fund is overfunded at a particular point in time is irrelevant under § 403(c)(1). The existence of a "surplus" in a pension fund is nothing more than an actuarial artifact. As plaintiffs themselves explain, a pension plan is "overfunded" at any point in time in which the present value of the Plan's assets exceeds the actuarially determined value of the Plan's liabilities. Appellant's Br. at 5. The only legal significance of a state of overfunding is that Hughes' obligation to pay into the Plan fund is temporarily suspended as long as the condition of overfunding exists. At all times, whether the fund's investment portfolio is prospering or heading south, Hughes' obligation to assure the financial health of the Plan remains constant.

It is inconceivable that Congress intended the lawfulness of a plan amendment to turn on whether a "surplus" existed at the

time of the amendment. Whether or not a surplus existed is logically irrelevant to the question whether the 1991 amendment adding a non-contributory benefit structure violated ERISA's anti-inurement provision. As written by Congress, § 403(c)(1) requires us to focus on the use the employer makes of pension fund assets, not whether the plan is overfunded. In focusing on the existence of the surplus, both the plaintiffs and the majority ignore the plain language of § 403(c)(1), which restricts the use of fund assets to the payment of pension benefits to plan participants.

Plaintiffs also seem to be arguing that § 403(c)(1) prohibits Hughes from using Plan assets to pay pension benefits to *new* employees (i.e., employees who joined the Plan after the effective date of the 1991 amendment), all of whom were required to enroll under the non-contributory structure. Again, the plaintiffs' rationale seems to be that the surplus is attributable in part to the contributions made by old employees before the effective date of the 1991 amendment. This argument, too, is meritless. There is no basis in § 403(c)(1) or in the Plan itself for distinguishing new employees from old employees in this manner. Both new and old employees are participants in the Hughes Plan, and Hughes is thus *required* under § 403(c)(1) to use Plan funds to pay pension benefits to both. In essence, plaintiffs are again claiming that Hughes somehow violated § 403(c)(1) when it used Plan funds to pay pension benefits to Plan participants.

Finally, plaintiffs seem to be arguing that § 403(c)(1) prohibits Hughes from using Plan funds to pay pension benefits to employees, new or old, enrolled under the non-contributory structure. This argument is also without merit. In order to make sense of their argument, the plaintiffs must distinguish between two subsets of pre-amendment employees--those who elected to remain enrolled under the contributory structure, and those who elected to switch to the non- contributory structure. The plaintiffs do not, and cannot, draw this distinction. The only difference between these two subsets of old employees is

that one group chose to contribute a portion of their paychecks to the fund and receive greater pension benefits in return, while the other group chose to accept a lower level of pension benefits so they could keep their full paychecks for current use. Surely the plaintiffs do not mean to say that § 403(c)(1) prohbits the use of Plan funds to pay benefits to these employees simply because they exercised their option to switch to the non-contributory structure. In sum, I see no basis in § 403(c)(1) or any other provision of ERISA for plaintiffs' argument that ERISA forbids Hughes from using Plan assets to pay pension benefits to *all* Plan participants, whether enrolled under the contributory or non-contributory benefit structure.

Despite the fact that nothing in § 403(c)(1) forbids Hughes from using Plan assets to pay benefits to Plan participants, the majority reverses the district court's § 12(b)(6) dismissal of the action and remands for further proceedings because it finds an unresolved issue of material fact, namely, whether the 1991 amendment to the Plan adding a non-contributory benefit structure effected a termination of the Plan. If the Plan is terminated, then § 4044(d) of ERISA, 29 U.S.C. § 1344(d), kicks in and requires an equitable distribution of the Plan assets after all Plan liabilities are satisfied. If such a distribution were to occur, the named plaintiffs, as retirees who made contributions to the Plan before their retirement, would receive a share of the $1 billion surplus (if it still exists),[6] in addition to the defined pension benefits they are now entitled to.

The majority is incorrect in saying that there is a material issue of fact standing in the way of affirming the district court's § 12(b)(6) dismissal of this action. The plaintiffs' quest to have the Hughes Plan terminated and its assets distributed is based on the following facts, none of which is in dispute:

1. The Hughes Plan existed as a contributory plan;

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[6] It is possible, of course, that the Plan's investments have declined in value since plaintiffs filed their complaint in 1992, and that the surplus has therefore diminished or disappeared.

2. The successful investment of Plan funds resulted in a surplus of $1 billion;

3. The Hughes Plan was amended to create a non-contributory benefit structure that was made optional for existing employees and mandatory for new employees;

4. The new employees and those existing employees who opted to enroll under the non-contributory structure make no contributions to the Plan fund and receive lesser benefits than existing employees who opt to remain enrolled under the contributory structure; and

5. The assets of the Hughes Plan, including any "surplus" that may exist, are used to fund pension benefits under both the contributory and non-contributory benefit structures.

The majority does not and cannot disagree that these material facts are undisputed. The "question of fact" that the majority does rely upon to justify a remand is the question whether the amendment terminated the Plan altogether. Opinion at 887. That, however, is not a question of fact, but a question of law.

The record is clear that plaintiffs have alleged all the facts necessary for deciding the *legal* question of whether ERISA forbids Hughes from amending its contributory pension plan to add a non-contributory benefit structure. The plaintiffs' theory is that Hughes violated the anti-inurement provision of ERISA by creating a new and separate non-contributory plan and using the assets of its contributory plan to discharge its obligations to fund the new plan. In doing all this, plaintiffs argue, Hughes used the assets of the Plan for its own purposes rather than "for the exclusive purposes of providing benefits to the participants of the plan" in violation of § 403(c)(1), 29 U.S.C. § 1103(c)(1), the anti-inurement provision of ERISA, resulting in a termination of the Hughes Plan and an equitable distribution of the surplus pursuant to ERISA § 4044(d), 29 U.S.C. § 1344(d).

In accepting plaintiffs' anti-inurement claim as viable, the majority relies upon neither of the two cases the plaintiffs cite in support of that claim, *Bridgestone/Firestone, Inc. v. Pension Benefit Guar. Corp.*, 892 F.2d 105 (D.C. Cir. 1989) and *Holland v. Amalgamated Sugar Co.*, 787 F. Supp. 996 (D. Utah 1992), *aff'd in part & rev'd in part sub nom. Holland v. Valhi, Inc.*, 22 F.3d 968 (10th Cir.1994). The majority's omission is understandable since the cases are not on point. *Bridgestone* and *Holland* deal with the process of distributing a pension plan's assets under § 4044(d), 29 U.S.C. § 1344(d), once a plan has been terminated. As a result, the cases do not address the antecedent question we are confronted with, which is *whether* a plan has been terminated in the first place.

The majority cites no authority for its holding that plaintiffs' anti-inurement and termination theories are sufficiently viable to survive Hughes' motion to dismiss. It does not claim that either of the cases it cites, *Lockheed*, 116 S.Ct. at 1783, and *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir.1985), *cert. dismissed*, 474 U.S. 1113 (1986), supports its view. Rather, the majority cites these cases only to distinguish them and to claim they do not stand in the way. Both *Lockheed* and *Amato* stand for the proposition that an employer does not act in its fiduciary capacity when amending a pension plan, and that a plan amendment adding a new benefit structure does not violate ERISA. The majority attempts to distinguish both *Lockheed* and *Amato* on the ground that each involved an amendment to a non-contributory plan, while this case involves an amendment to a contributory plan. However, there is nothing in either the *Lockheed* or *Amato* opinion indicating that either holding should be limited to non-contributory plans. In fact, neither *Lockheed* or *Amato* mentions whether the plan at issue was contributory or non-contributory. In other words, there is no basis whatsoever for limiting the precedential value of these cases to non-contributory plans, as the majority does.

This contributory/non-contributory dichotomy is the heart of the majority's analysis. The dichotomy, however, is a false one for the purpose of deciding whether Hughes violated ERISA in adding a non-contributory benefit structure to the Plan. There are, of course, contractual differences between the two types of pension plan, as the facts of this case illustrate. Under the contributory benefit structure, the employee makes cash contributions to the Plan and receives greater benefits. Under the non-contributory structure, the employee contributes nothing to the Plan and receives lesser benefits. Either way, the benefits are provided out of a single fund and it is the ultimate responsibility of Hughes to make whatever contributions are necessary to assure that the fund does not accumulate a "funding deficiency." *See supra* Part I, at 906. In terms of economic reality, it should make no difference whether an employee makes contributions to a plan directly, or whether the employee makes contributions indirectly through the employer. Either way, the contributions are the economic product of the employee's services.

To be sure, there are provisions in ERISA that are designed for the protection of an employee's contributions to a pension plan. An employee's contributions are always nonforfeitable, which means that the employee has a legally enforceable right to recover his contributions with interest, even if he leaves the plan before reaching normal retirement age. ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1). In addition, if a plan is terminated, participants are entitled to an equitable distribution of the surplus, with each share proportional to the individual participant's contributions, as long as all other plan liabilities are first satisfied. 29 U.S.C. § 1344(d)(3). Except for these protections for employee contributions, ERISA limits an employee's interest in a pension plan fund to his "accrued benefits," which are the benefits defined under the terms of the plan. 29 U.S.C. § 1002(23). *See also Johnson*, 19 F.3d at 1189 (rejecting retirees' claim that they were entitled to the same benefits increase as active employees when surplus resulted in part from retirees' contributions, reasoning that because "a

defined-benefit plan gives current and former employees property interests in their pension benefits but not in the assets held by the trust").

The ERISA provisions protecting employee contributions have no bearing on the question whether Hughes violated ERISA in amending its contributory plan to add a non-contributory benefit structure. On this point the majority and I are in sharp disagreement. The majority asserts that the distinction between the two types of pension plans is "critical" to the termination question, but offers no cogent reason why it is "critical" or even relevant. Opinion at 887. The only authority cited by the majority is §§ 203 and 4044(d)(3)(A) of ERISA, 29 U.S.C. §§ 1053 and 1344(d)(3)(A), which—as discussed above—respectively establish minimum vesting requirements for accrued benefits derived from employee contributions, and provide that *in the event a pension plan is terminated*, any surplus assets attributable to employee contributions shall be distributed equitably to participants who have made contributions. But how do provisions governing nonforfeiture of accrued benefits, on the one hand, and distribution of assets once a plan is terminated, on the other, help us decide *whether* a plan has been terminated? The majority's only answer is that the plaintiffs have *alleged* that the non-contributory amendment resulted in the termination of the contributory plan. Opinion at 888. If this allegation were an allegation of fact, we would be obliged to accept it as true on this 12(b)(6) motion. But it is not an allegation of fact.[7] It is a conclusion of law. And it is a conclusion of law that cannot be reached except by following the circular path traveled by the majority.

To repeat, the majority has ordered a remand because of what it views as an unresolved issue of fact—whether the

[7] The majority leaves us clueless as to how a jury could be instructed to resolve as a question of fact whether the 1991 amendment effected a termination of the Plan.

amendment adding the non-contributory benefit structure resulted in the termination of the Hughes Plan. In my view, and the view of the district court, this is a pure question of law.

The majority also views the question whether any benefit Hughes received from the asset surplus was more than "incidental" as a question of material fact that cannot be resolved at the 12(b)(6) stage. Opinion at 890. The question, however, is beside the point. Whether an employer might realize cost savings from an amendment to a pension plan is not a factor Congress intended courts to consider in deciding whether a pension plan amendment violates ERISA's anti-inurement provision. The focus of our inquiry under ERISA's anti-inurement provision must be whether Hughes used Plan assets for a purpose other than the payment of benefits to Plan participants. The answer to that question is clearly no. The district court's dismissal of plaintiffs' § 403(c)(1) anti-inurement claim should be affirmed.

II

Second Claim: The 1991 Amendment as a Breach of Fiduciary Duty

In their second claim, plaintiffs assert that Hughes breached its fiduciary duties under ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A),[8] by "utilizing excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of defendant Hughes rather than for the benefit of Plan participants and their beneficiaries." Compl. ¶ 34. In their brief, plaintiffs argue that Hughes violated

[8] ERISA § 404(a)(1)(A) provides in relevant part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan. . . .

29 U.S.C. § 1104(a)(1)(A).

§ 404(a)(1)(A) "by expending surplus assets, especially those *attributable to employee contributions*, not to provide benefits to participants of the Contributory Plan, but rather to participants of the new Non-Contributory Plan whose benefits Hughes is obligated to fund." Appellants' Br. at 14-15 (emphasis in original).

Plaintiffs' second claim is not substantively different from their first claim. They merely allege a violation of the general fiduciary duty provision of ERISA, § 404(a)(1)(A), rather than the anti-inurement provision, § 403(c)(1). As such, plaintiffs' second claim is directly foreclosed by *Lockheed*'s holding that without exception, "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 116 S.Ct. at 1789. For the reasons stated in connection with plaintiffs' first claim, I do not agree with the majority that the Plan amendments enacted by Hughes implicated ERISA's fiduciary obligations because the Plan was a contributory plan. *See* Opinion at 891-92. To repeat, with minor exceptions, ERISA limits an employee's interest in a pension plan fund to his "accrued benefits," which are the benefits defined under the plan. 29 U.S.C. § 1002(23).

The district court's dismissal of plaintiffs' § 404(a)(1)(A) claim should be affirmed.

III

Third Claim: Vesting Requirements

In their third claim, plaintiffs allege that Hughes violated ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1),[9] "by using assets attributable to employees [sic] . . . contributions to meet [its own] funding obligations and [has] therefore caused a divestiture and forfeiture of rights." Compl. ¶ 36. This claim is based upon a misunderstanding of § 203(a)(1), which establishes minimum vesting standards. The purpose of § 203(a) is to guide courts in determining the percentage of an employee's pension benefits that cannot be divested under various circumstances.[10] In short, § 203(a)(1) sets out a vesting schedule that "address[es] the problem of how much to limit an employer's power to withdraw previously offered benefits." *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir.1990). This claim also fails.

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[9] ERISA § 203(a)(1) provides:

> A plan satisfies the requirements of [ERISA's minimum vesting standards] if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

29 U.S.C. § 1053(a)(1).

The plaintiffs do not allege that Hughes has ever withdrawn previously offered benefits. They do not allege that the 1991 amendment diminished in any way the defined benefits to which Plan participants enrolled at the time of the Amendment were entitled. In fact, employees active in the Plan before the 1991 amendment's effective date were given the choice between remaining enrolled in the contributory benefit structure and switching to the non-contributory structure. Retired members, all of whom had been enrolled in the contributory benefit structure, continued to receive the same defined benefits they were always entitled to under the Plan.

Although plaintiffs continue to receive their defined benefits under the Plan, they argue that the vesting provisions of § 203(a)(1) entitle them to benefits greater than those defined in the Plan. According to plaintiffs, § 203(a)(1) vests them 100% in their "own contributions and what they have earned." Appellants' Br. at 19. The plaintiffs are mistaken. Section 203(a)(1) requires that an employee's rights in the

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[10] For example, § 203(a) applies when an employee becomes disabled, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); when an employee has a break in service to a company, *Bolton v. Construction Laborers' Pension Trust*, 954 F.2d 1437 (9th Cir.1991); when a noncompetition forfeiture clause applies, *Clark v. Lauren Young Tire Ctr. Profit Sharing Trust*, 816 F.2d 480 (9th Cir.1987); or when an employee dies, *Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust*, 662 F.2d 617 (9th Cir.1981).

accrued benefit derived from his own contributions be nonforfeitable. 29 U.S.C. § 1053(a)(1) ("A plan satisfies [ERISA's minimum vesting standards] if an employee's rights in his *accrued benefit* derived from his own contributions are nonforfeitable.") (emphasis added). Nothing in the Plan or ERISA gives plaintiffs an ownership right in the investment return on their contributions. Under both the Plan and ERISA, plaintiffs are entitled to nothing more than their accrued benefits, which are the defined pension benefits they are now receiving. *See* ERISA § 3(23), 29 U.S.C. § 1002(23) (providing that "accrued benefits" are defined solely by terms of pension plans).

The district court's dismissal of plaintiffs' § 203(a)(1) should be affirmed.

IV

Fourth Claim: "Wasting Trust"

The plaintiffs' fourth claim is based solely on the theory that the 1991 amendment creating the non-contributory benefit structure somehow had the effect of converting the Plan into a "wasting or dry trust." The plaintiffs do not explain what they mean by the term "wasting trust," nor do they explain how the creation of a non-contributory benefit structure could possibly turn the Plan into a "wasting trust." The plaintiffs' argument in support of this claim is limited to a citation of a single case, *In re Gulf Pension Litig.*, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd* on other grounds *sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir.1994). They make no attempt to show that the two cases share any facts that might be material to their wasting trust theory.

In *Gulf Pension*, the district court described the "wasting or dry trust" doctrine as the principle "[a]t common law [that] if a trust did not state a definite term, it was deemed to last until its purpose was accomplished." *Id.* at 1202. The court deemed the *Gulf Pension* plan to have been terminated because all of its

purposes had been accomplished. *Id.* at 1203. The *Gulf Pension* court explained:

> [Plan] membership has long been closed and the plans are substantially overfunded as to all future liabilities. The [pension plans] are not accruing significant benefit obligations that could potentially eliminate their surpluses. Nor could the surpluses be used to eliminate or reduce future employer contributions since none have been made since 1970. Therefore, . . . delaying termination of the . . . trusts would benefit neither the plans nor their participants in the future.

Id. at 1204. The *Gulf Pension* court based its finding that all the trust's purposes had been accomplished on the following facts: Only 2900 active employees and 16,000 retirees were enrolled in the *Gulf Pension* plan. *Id.* at 1203. Retired members accounted for 94% of the *Gulf Pension* plan's liabilities. *Id.* In addition, most of the active members were nearing retirement, which meant that projected benefits for their future service were "*de minimis* in relation to the surplus assets in the plans." *Id.*

The plaintiffs allege no facts of the kind relied upon by the *Gulf Pension* court in finding a "wasting trust." Most notably, plaintiffs do not allege that the Hughes Plan's purposes have been accomplished. Indeed, the only fact alleged in the wasting trust claim is that the Hughes Plan was amended in 1991 to create a non-contributory benefit structure. The plaintiffs do not even attempt to explain why there is any logical connection between the 1991 amendment and their wasting trust theory. All they do is cite *Gulf Pension*.

The majority cites the district court's decision in *Gulf Pension* in a footnote, contending that plaintiffs' allegations that the 1991 amendment adding a non-contributory benefit structure converted the Plan into a wasting trust survive a Rule 12(b)(6) challenge because the "question of when a termination occurs is a mixed question of law and fact." Opinion at 888 n. 3. In the view of the majority the questions of whether the

"Contributory Plan's [sic] purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan" are material questions that can only be answered after discovery. *Id.* at 889. I disagree. As explained above, I believe that, as a matter of law, the Plan was not terminated by the addition of a non-contributory benefit structure.

The district court's dismissal of plaintiffs' wasting trust claim should be affirmed.

V

Fifth Claim: Transfer to a Party in Interest

In their fifth claim, plaintiffs argue that use of assets from the "contributory plan" to fund the benefits of participants in the "non-contributory plan" constitutes a use or transfer to Hughes, a party in interest, in violation of ERISA §§ 406(a)(1)(D) & (b)(2), 29 U.S.C. § 1106(a)(1)(D) & (b)(2).[11] The analysis I apply in rejecting plaintiffs' first and second claims is also applicable to the fifth claim. *See supra* Parts I and II.

I would find no violation of § 406 even if Hughes had created two separate pension plans, one contributory and the

[11] ERISA § 406(a)(1)(D) provides:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan. . . .

29 U.S.C. § 1106(a)(1)(D).

ERISA § 406(b)(2) provides:

> A fiduciary with respect to a plan shall not . . . in his individual capacity or in any other capacity act in any transaction involving the plan on behalf of a party . . . whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. . . .

29 U.S.C. § 1106(b)(2).

other non-contributory. Notwithstanding any incidental benefit Hughes might have received from the 1991 amendment, Hughes did not transfer funds to itself as a party in interest. Indeed, the "payment of benefits conditioned on performance by plan participants cannot reasonably be said to [come within the scope of § 406]." *Lockheed*, 116 S.Ct. at 1791 (holding that employer did not violate § 406 when it amended its retirement plan to create a new benefits schedule with new conditions for eligibility to be paid for from the plan's asset surplus). Nothing in ERISA prohibits two different benefit structures from being funded from one source. *Cf. Holliday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984) (holding that transfer of funds from one pension account to another, and subsequent use of transferred funds as setoff in calculating retirement benefits, was permissible under ERISA); Treas.Reg. § 1.414(l)-1(b)(1)(i), 26 C.F.R. § 1.414(l)-1(b)(1)(i) (1995) (providing that, for income tax purposes, pension plan will be considered as "single plan" even if "plan has several distinct benefit structures"). Because the amendment was within Hughes' power as a settlor, *see supra* Part I, and because Hughes did not transfer assets to itself as a party in interest, I would affirm the district court's dismissal of plaintiffs' fifth claim, which is based on § 406.[12]

VI

Sixth Claim: The Early Retirement Program as a Breach of Fiduciary Duty

The plaintiffs' sixth claim is based upon a 1989 amendment to the Hughes Plan. In the 1989 amendment, Hughes created an early retirement program which offered improved retirement benefits to some active employees who elected to take early retirement. The 1989 amendment made no changes in the

[12] Plaintiffs make no allegations of fact to support their claim that Hughes' amendment of the plan was a "sham transaction" meant to disguise an otherwise unlawful act. They merely allege "sham" in a conclusory fashion.

defined benefits that retirees, such as plaintiffs in this action, were already receiving.

The plaintiffs claim that, in creating the early retirement program, Hughes violated its fiduciary duties under ERISA § 404(a)(1)(D), which requires plan fiduciaries to carry out their duties "in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). The plaintiffs argue that Hughes violated this section because the 1989 amendment discriminated against plaintiffs in providing that Plan assets would be used to fund improved benefits exclusively for those active employees who were made eligible for early retirement. According to plaintiffs, this use of Plan assets contravened Article V, § 5.2 of the Plan, which provides that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purposes of the Plan." The majority acknowledges that, in *Lockheed*, the Supreme Court held that an employer may amend a retirement plan to offer an early retirement program funded by surplus plan assets without violating ERISA. Nonetheless, the majority holds that plaintiffs have stated a claim under § 404(a)(1) because the assets used to fund Hughes' early retirement program are in part attributable to employee contributions.

The majority's holding cannot be squared with *Lockheed*, nor with cases from two other circuits which have held that pension plan amendments that create retirement windows with incentives for early retirement do not violate § 404(a)(1) of ERISA. *Belade v. ITT Corp.*, 909 F.2d 736, 737-38 (2d Cir.1990); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir.1987), *cert. denied*, 485 U.S. 1022 (1988). These cases emphasize the precept that when an employer amends a plan, just as when an employer first designs a plan, it acts as a *settlor* and not as a *fiduciary*. *Lockheed*, 116 S.Ct. at 1789; *Belade*, 909 F.2d at 738; *Trenton*, 832 F.2d at 809; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994)

(holding that plan amendment improving benefits for active workers does not violate § 404(a)(1)); *see also supra* Part I.

To distinguish *Lockheed*, the majority again relies on a purported distinction between contributory and non-contributory benefit structures.[13] Without citing any authority, the majority asserts that it "do[es] not think that an employer can unilaterally decide to use plan assets attributable to employee contributions without implicating ERISA's fiduciary obligations." Opinion at 903. The majority seems to be saying that employees are co-settlors of contributory plans. The majority, of course, offers no authority for this startling proposition. Moreover, even if we treated employees as settlors of contributory plans, the majority still fails to explain how that makes their ostensible co-settlor, Hughes, a "fiduciary" within the meaning of § 404(a).

Although plaintiffs assert that the early retirement amendment "raises all of the same issues presented in" the first five claims, Appellants' Br. at 30, they fail to elaborate any further. I see no violation of any section of ERISA in Hughes' creation of the early retirement program. The district court's dismissal of plaintiffs' claims regarding the 1989 amendment should be affirmed.

CONCLUSION

The majority holds that plaintiffs have stated a claim upon which relief can be granted under ERISA on the theory that Hughes terminated the Plan when it merely amended it to include a non-contributory benefit structure as well as a contributory benefit structure. Thus, the majority clears the way for plaintiffs to continue on their quest for their pot of gold, a share of the $1 billion surplus. If plaintiffs ultimately succeed in obtaining a judgment declaring the contributory plan to be terminated, their pensions will no longer be limited

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[13] The only valid distinctions between contributory and non-contributory benefit structures are discussed *supra* in Part I, at 914.

to their "defined benefits." It is understandable that the plaintiffs (and their lawyers) covet the financial gains that resulted from the successful investment strategy that dramatically increased the value of the Plan's assets in the 1980s. But that does not diminish the reality that they have failed to state a legally cognizable claim.

Moreover, the majority's decision may have serious adverse consequences for the 10,000-odd participants in the Hughes Plan if this litigation ends in a judicial decree terminating the Plan and distributing the Plan assets. If the Plan continues to run a sizeable surplus as a result of a successful investment portfolio, retirees like the plaintiffs in this action would get a windfall over and above their defined pension benefits. It is not clear, however, where this would leave Plan participants who are still working toward retirement, including those existing employees who opted to remain covered under the contributory benefit structure, those who opted for the non-contributory structure, and the new employees who are enrolled under the non-contributory benefit structure as a matter of plan design.

In addition, the unfortunate effects of the majority's decision may extend well beyond the parties in this particular action. Today's decision announces that in the Ninth Circuit there are severe, if vague and ill-defined, restrictions on the discretion of employers charged as plan settlors under ERISA with responsibility for the design of qualified pension plans. Only time can tell what impact these vague and uncertain restrictions will have on employers and their employees.

In my view, there is no basis in ERISA, the caselaw, or logic for the majority's decision that in amending its pension plan, Hughes effectively terminated the plan. If ERISA is in need of clarifying or restricting amendments to the provisions relating to the authority of employers as settlors to design pension plans, that need should be addressed by Congress, not this court.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STANLEY I. JACOBSON; Daniel P. Welsh;
Robert E. McMillin; Ernest O. Blandin;
Richard E. Hook,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY; Hughes
Non-Bargaining Retirement Plan,

Defendants-Appellees.

No. 93-55392
D.C. No. CV-92-04020-RG

Amended October 23, 1997

Before: Betty B. Fletcher, Harry Pregerson,
and William A. Norris, Circuit Judges

**ORDER AMENDING OPINION AND
DENYING PETITION FOR REHEARING**

The majority opinion, filed January 23, 1997, is amended as follows:

At Slip Opinion page 888 footnote 3, delete the first sentence of the second paragraph and delete the last sentence of the third paragraph.

At Slip Opinion page 900, delete the first full paragraph starting with "In determining whether . . ." and ending with ". . . to ERISA context)."

With the above amendment, a majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY I. JACOBSON; Daniel P. Welsh; Robert E. McMillin; Ernest O. Blandin; Richard E. Hook,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY; Hughes Non-Bargaining Retirement Plan,

Defendants-Appellees.

No. 93-55392
D.C. No. CV-92-04020-RG

Filed January 23, 1998

Before: Betty B. Fletcher and Harry Pregerson, Circuit Judges.

ORDER CLARIFYING THE ORDER AMENDING OPINION AND DENYING PETITION FOR REHEARING, FILED OCTOBER 23, 1997

In response to the Motion for Clarification filed by Defendants-Appellees Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan, filed December 2, 1997, the Order Amending Opinion and Denying Petition for Rehearing, filed October 23, 1997, is clarified and amended as follows:

At Slip Opinion page 888 in footnote 3, in the third paragraph, the deletion should be only of the sentence "The question of when a termination occurs is a mixed question of law and fact." The citation should be corrected as follows: "*See* 26 C.F.R. § 1.401. . . ."

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CV-92-4020-RG (Bx)

ORDER OF DISMISSAL OF ACTION

This cause came on for hearing on December 14, 1992, before the Honorable Richard A. Gadbois, Jr., United States District Judge, presiding, on the motion of plaintiffs Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernst O. Blandin and Richard E. Hook ("plaintiffs") for relief from an order dismissing the complaint issued on October 19, 1992, and for an order vacating the dismissal. Previously, the motion of defendants Hughes Aircraft Company ("Hughes") and Hughes Non-Bargaining Retirement Plan (the "Plan") (collectively "defendants") to dismiss the complaint, and each cause of action therein, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted or, alternatively, for a more definite statement pursuant to Rule 12(e) and to strike portions of the complaint pursuant to Rule 12(f), had come on for hearing on October 19, 1992. Plaintiffs had at that time filed no opposition pleading

to defendants' motions and had failed to appear at the hearing.[14] The Court granted defendants' motion to dismiss with leave to amend.

Plaintiffs' then responded with their motion for relief from the order of dismissal, and included with their motion an opposition to defendants' motion to dismiss. At the hearing on plaintiffs' motion for relief, the Court announced that it would consider plaintiffs' opposition to the motion to dismiss on the merits, and granted defendants the opportunity to reply to plaintiffs' opposition. Defendants thereafter filed their reply.

The Court, having considered plaintiffs' motion for relief from the prior order dismissing the complaint, having considered plaintiffs' opposition to defendants' motion to dismiss and the pleadings and files herein, having heard the argument of counsel and having concluded that defendants' motion to dismiss should be granted, finds as follows:

1. This action arises under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. § 1001 *et seq*. Plaintiffs include individual participants in the Hughes Non-Bargaining Retirement Plan. The action was commenced as a purported class action pursuant to Rule 23(b)(1) & (2) of the Federal Rules of Civil Procedure. (Complaint ¶¶ 10-12).

2. Defendants in this action are Hughes Aircraft Company and the Hughes Non-Bargaining Retirement Plan.

3. The complaint purports to state six causes of action, each alleging that various provisions of ERISA have been violated. Plaintiffs do not allege that the Plan has failed to provide any benefits due under the Plan, nor that the Plan lacks

[14] Counsel for defendants, who was present at the hearing, stated to the Court that, subject to the approval of the Court, he had previously agreed to and signed a stipulation for a continuance for the filing of plaintiffs' opposition and for the hearing, but no written request by plaintiffs for a continuance had been received by the Court as of the time of the hearing.

sufficient assets to pay all accrued benefits (vested or non-vested) due the participants. Rather, the essence of plaintiffs' complaint is that the Plan was effectively terminated when it was amended effective January 1, 1991 (Complaint ¶ 4), and that, therefore, certain excess Plan assets should be distributed to them in the form of "improved pension benefits." (Complaint ¶ 1.) Plaintiffs further allege that because of a surplus of assets in the Plan, Hughes did not make contributions to the Plan from 1986 to 1990, and may not be required to make contributions in the future. (Complaint ¶¶ 3, 25, 29, 30.) Accordingly, plaintiffs contend that defendants are "using" Plan assets attributable to employee contributions to meet "defendants funding obligaitons." (Complaint ¶¶ 35, 36.)

4. In their first cause of action, plaintiffs allege that defendants have violated ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1), the "anti-inurement" provision, "by utilizing excess plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of participants and the class they represent." (Complaint ¶¶ 31-32.) Plaintiffs claim that by not making contributions to the Plan for several years, Hughes "utilized" surplus assets in the Plan generated by employer and employee contributions to meet its funding obligations.

5. Assuming the truth of those allegations for the purposes of this motion to dismiss, such conduct does not violate ERISA's anti-inurement provision for at least the following reasons:

(a) Plaintiffs' allegation that the Plan has terminated is inconsistent with their argument that the anti-inurement provision has been violated. In the event of a plan termination, the reversion of surplus assets to participants is expressly governed by ERISA Section 4044, 29 U.S.C. § 1344. As plaintiffs do not allege that the provisions of ERISA Section 4044 have been violated, they implicitly acknowledge that in fact there has not been a Plan termination. Consequently, unless and until a Plan termination occurs, plaintiffs are

entitled to nothing other than the Plan's defined benefits, and they have no vested right to surplus assets.

(b) While plaintiffs contend that Hughes is improperly utilizing excess funding "due to employee contributions," the Plan is a "defined benefit plan" and the excess funding is that of the Plan and is due to all contributions, including those of Hughes. *See, e.g.*, ERISA Section 302, 29 U.S.C. § 1082. No participant has a right to the surplus assets, but instead is entitled to the defined benefit (including any accrued benefit due to his contributions, 29 U.S.C. § 1054(c)(2)(B) & (C)).

(c) The terms of the Plan impose an obligation on Hughes to contribute to the Plan only when necessary to ensure sufficient funding, and correlatively permits Hughes to cease making contributions when a surplus exists.[15] Both before and after the 1991 Plan amendments, the Plan provided in Section 3.1 that "the cost of Benefits under the Plan to the extent not provided by contributions of Participants under Section 3.4 shall be provided by contributions of the Companies." Additionally, Section 6.2 of the Plan expressly states that "a Company shall have the right to suspend its contributions to the plan at any time." Therefore, Hughes has satisfied its funding obligations under the terms of the Plan.

(d) There is no requirement under ERISA that imposes a duty upon an employer to continue contributing to an already overfunded plan, even when the plan is funded, in part, by employee contributions. *Fechter v. HMW Indus., Inc.*, 879 F.2d 1111(3d Cir. 1989); *LLC Corp. v. Pension Benefit*

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[15] Plaintiffs did not elect to attach copies of the Plan documents to the complaint, although they purport to rely upon such documents in their complaint. Defendants are entitled, therefore, to introduce these documents as part of their motion to dismiss under Rule 12(b)(6). 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1327, pp. 760-61 (2d ed. 1990); *Fudge v. Penthouse Int'l., Ltd.*, 840 F.2d 1012, 1014-15 (1st Cir. 1988); *Ed Miniat. Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 n.12 (7th Cir. 1986). *Cf. Interstate Natural Gas Co. v. Southern Calif. Gas Co.*, 209 F.2d 380 (9th Cir. 1953).

Guaranty Corp., 703 F.2d 301, 302 (8th Cir. 1983). Indeed, once the Plan became overfunded, Hughes had to halt contributions or its contributions would have been treated as non-deductible expenses and it would have incurred a 10% tax penalty on such excess contributions. 26 U.S.C. § 404(a)(1)(A), § 4972(c)(1)(B).

(e) ERISA's anti-inurement provision is not violated absent action such as employer withdrawals or threatened withdrawals of plan assets, neither of which has occurred here. *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986). As the court in *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906, 919 (S.D. Ga. 1990), *aff'd in relevant part*, 953 F.2d 587 (11th Cir. 1992) noted, a plaintiff must show that the employer's use of plan assets "result[ed] in a direct gain to the employer." Incidental benefits, such as increased employee productivity and morale, are insufficient to state a claim. *Id. See also Holiday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984); *Constantino v. TRW, Inc.*, 773 F. Supp. 34, 44-45 (N.D. Ohio 1991).

6. In their second cause of action, plaintiffs allege that defendants have a fiduciary duty, pursuant to ERISA Section 404(a)(1)(A) & (B), 29 U.S.C. § 1104(a)(1)(A) & (B), to utilize "excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of . . . plan participants and their beneficiaries." (Complaint ¶ 33.) Plaintiffs contend that defendants have breached this duty by utilizing "excess Plan assets" for the exclusive benefit of Hughes, in that Hughes filed to make contributions to the Plan from 1986 to 1990, and may not make contributions in the future. (Complaint ¶¶ 25, 29, 34.) Plaintiffs also allege that a fiduciary breach arises from Hughes' 1991 amendments of the Plan, which plaintiffs claim created a new non-contributory plan.

7. An entity acts as a fiduciary only when it exercises discretion as to plan management, renders investment advice or

exercises discretion as to plan administration. ERISA Section 3(21), 29 U.S.C. § 1002(21). Plan design, however, is an exercise of an employer's settlor or design function and does not implicate fiduciary obligations. *See, e.g.*, *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1159-60 (3d Cir. 1990); *Cuhna v. Ward Foods, Inc.*, 804 F.2d 1418, 1432 (9th Cir. 1986). As only an employer, and not a fiduciary, makes contributions to a plan and as Hughes had no obligation to make contributions to an overfunded plan, there is no breach of fiduciary duty with respect to funding the Plan. Further, an employer's decision to amend a plan to provide for surplus asset reversion to the employer is a plan design decision which does not implicate fiduciary functions. *See Bigger v. American Commercial Lines, Inc.*, 862 F.2d 1341, 1347 (8th Cir. 1988); *Foster Medical Corp. Employees' Pension Plan v. Heathco, Inc.*, 753 F.2d 194, 199 (1st Cir. 1985); *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976, 996 (D.N.J. 1991); *Chait v. Bernstein*, 645 F. Supp. 1092, 1100 (D.N.J. 1986), *aff'd*, 835 F.2d 1017 (3rd Cir. 1987).

8. Plaintiffs' second cause of action is further based upon the claim that the Plan as amended is in fact two plans. This assumption is erroneous upon the face of the Plan documents, and it is readily apparent that the contributory benefits structure remains in effect as part of the single Plan.

9. Plaintiffs' third cause of action alleges that Hughes has utilized assets "attributable to employees own contributions" to meet its funding obligations, and has thereby effected a forfeiture of employee rights in violation of ERISA Section 203(a), 29 U.S.C. § 1053(a). (Complaint ¶¶ 35, 36.)

10. Plaintiffs' third cause of action fails to state a claim first because the Plan is alleged to be overfunded and thus any use of assets attributable to employee contributions to meet a funding obligation of Hughes cannot exist. Second, the Ninth Circuit Court of Appeals has found that "nothing in ERISA prohibits 'a plan providing for forfeiture of benefits when the affected benefits are in excess of the minimum vesting

requirements of 29 U.S.C. § 1053.'" *Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 450 (9th Cir. 1980) (*quoting Hepple v. Roberts & Dybdahl, Inc.*, 622 F.2d 962, 965 (8th Cir. 1980)). Because the Plan has excess assets, no forfeiture of accrued benefits can have occurred.

11. Moreover, any accrued benefits claimed by plaintiffs cannot be forfeited until the Plan is terminated and surplus assets attributable to employee contributions are not properly paid to participants. That has not happened, and the Plan expressly provides that accrued benefits will be available to each contributory participant. *See* Section 3.4-A of the amended Plan.

12. Plaintiffs' fourth cause of action alleges that the contributory plan was terminated in January 1991 when Hughes created a new non-contributory benefits structure and that, therefore, the excess assets attributable to employee contributions are to be distributed pursuant to ERISA Section 4404, 29 U.S.C. § 1344. (Complaint ¶ 42.)

13. Creation of a new benefits schedule or structure does not terminate a plan, and this claim fails on that ground alone. Indeed, plan terminations must be accomplished pursuant to the rules specified in 29 U.S.C. § 1341, and there is no allegation by plaintiffs that such a procedure has been instituted. Further, plaintiffs' argument overlooks the fact that thousands of participants, including thousands of active employees, have elected to remain under the contributory benefits structure and are continuing to receive benefits thereunder. Thus, absent a complete Plan termination, which cannot have occurred, plaintiffs are not entitled to recover surplus plan assets. *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3rd Cir. 1987).

14. The wasting trust analysis utilized in *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991) is not applicable here. Here there are thousands of active contributory participants in the Plan, the right to elect the contributory benefits structure was not eliminated 20 years ago,

the Plan provides for reversion to the employer and the purposes of the Plan have not been fulfilled.

15. Plaintiffs' fifth cause of action again alleges a breach of fiduciary duty, but in this instance plaintiffs contend that "defendants intend to divert assets of the Plan to pay benefits to participants of the new non-contributory plan who are not participants in the Plan," thereby violating their fiduciary duty. (Complaint ¶ 49.)

16. As the allegations are insufficient to establish that a new plan has been created, Plan assets cannot have been unlawfully diverted. In any event, the allegation is insufficient to state a claim because, to violate ERISA Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), the transfer of assets would have to be from the plan to a party in interest. Here the assets are simply being used to provide benefits under the Plan. Moreover, even if assets were being "transferred" from a contributory plan to a non-contributory plan, an employer's "transfer of funds" from one pension account to another does not implicate ERISA's fiduciary provisions. *Holliday v. Xerox Corp.*, 732 F.2d 548, 551 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984). As the court in *Lynch v. J.P. Stevens & Co.*, 758 F. Supp. 976 (D.N.J. 1988), stated:

> The defendants did not breach their fiduciary duties to be loyal to plan participants and to act for their exclusive benefit by managing the plan in such a way as ultimately proved profitable. It defies the purposes of ERISA to hold that employers should be penalized for managing a plan in a way best calculated to assure its continued financial viability. That such management or investment strategies have the incidental benefit to an employer of reducing its contributions does not alter this.

758 F. Supp. at 1008.

17. *Cutaiar v. Marshall*, 590 F.2d 523 (3rd Cir. 1979) is not apposite. A plan amendment to establish a new non-

contributory benefits structure does not terminate the plan. *See* Treasury Regulation § 1.414(l)-1(b)(1), 26 CFR § 1.414(l)-1(b)(1).

18. *Cutaiar*'s prohibited transaction analysis is inapplicable because there has been no "transaction," no separate benefit plans and no knowing acts by fiduciaries to enter into an imaginary transaction in any event. Moreover, nothing in ERISA prohibits two different benefit programs from being funded from one funding source. *See, e.g.*, ERISA Section 3(3), 29 U.S.C. § 1002(3).

19. Plaintiffs' sixth cause of action alleges that defendants violated the terms of the Plan by providing early retirement benefits in a discriminatory manner. Plaintiffs allege that in 1989 Hughes amended the Plan to create an "Operational Transition Plan" ("OTP") which provided significant additional retirement benefits to certain eligible employees. The purpose of the OTP was to induce employees to elect early retirement. (Complaint ¶ 26.) Plaintiffs assert further that fiduciaries must carry out their fiduciary duties in accordance with the Plan documents and that the Plan provides for equitable and fair administration. (Complaint ¶¶ 52, 54.) That has not occurred, plaintiffs contend, because the benefits were made available "only to certain participants who were active employees of Hughes at the time of the adoption of the OTP Amendment and not to existing retirees and certain other Plan participants." (Complaint ¶ 55.)

20. Plaintiffs' sixth cause of action fails to state a claim because an employer designing an early retirement window program is acting as the plan creator, not as a fiduciary administering the plan. *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 809 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Plaintiffs' reference to the general Plan language for equitable treatment, and the alleged fiduciary obligation to follow it, adds nothing. Were it not so, a plan could never be amended to provide

different benefits for different participants, and such is simply not the case under ERISA.

Based on the foregoing findings, the Court hereby orders that defendants' motion to dismiss the entire complaint, and each cause of action therein, is granted without leave to plaintiffs to amend, that the entire action is dismissed on the merits with prejudice, that defendants' motion for a more definite statement is deemed moot, and that defendants' motion to strike is deemed moot.

DATED: 2-9, 1993

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CV-92-4020-RG (Bx)

JUDGMENT

This cause came on for hearing on December 14, 1992, before the Honorable Richard A. Gadbois, Jr., United States District Judge, presiding, and the issues having been duly heard and an order of dismissal of action having been duly rendered this same date,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the complaint herein and each cause of action therein be dismissed without leave to amend, that the entire action be and hereby is dismissed on the merits with prejudice.

DATED: 2-9, 1993

/s/ Richard A. Gadbois, Jr.
RICHARD A. GADBOIS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX F
PERTINENT STATUTORY PROVISIONS

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

****

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

****

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under section 1054(c)(2)(B) of this title with respect to the employees accumulated contribution.

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29 U.S.C. § 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to

a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in section 1055 of this title).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multi-employer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely

because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from mandatory contributions (as defined in the last sentence of section 1054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). The plan provision required under this clause may provide that such repayment must be made (I) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (II) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(v) Cross reference.—

For nonforfeitability where the employee has a nonforfeitable right to at least 50 percent of his accrued benefit, see section 1056(c) of this title.

(E)(i) A right to an accrued benefit derived from employer contributions under a multi-employer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(F) A matching contribution (within the meaning of section 401(m) of title 26 shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is

treated as an excess contribution under section 401(k)(8)(B) of title 26, an excess deferral under section 402(g)(2)(A) of title 26, or an excess aggregate contribution under section 401(m)(6)(B) of title 26.

(b) Computation of period of service

(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18,[1]

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions,[1]

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had at least 3 years of service after December 31, 1970;

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service—

(i) with an employer after—

[1] So in original. The comma probably should be a semi-colon.

(I) a complete withdrawal of such employer from the plan (within the meaning of section 1383 of this title), or

(II) to the extent permitted by regulations prescribed by the Secretary of the Treasury, a partial withdrawal described in section 1385(b)(2)(A)(i) of this title in connection with the decertification of the collective bargaining representative; and

(ii) with any employer under the plan after the termination date of the plan under section 1348 of this title.

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term "1-year break in service" means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 1054(b)(1)(F) of this title who has 5 consecutive 1-year breaks in service, years of service after such 5-year period shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such 5-year period.

(D)(i) For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of—

(I) 5, or

(II) the aggregate number of years of service before such period.

(ii) If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in service.

(iii) For purposes of clause (i), the term "nonvested participant" means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E)(i) In the case of each individual who is absent from work for any period—

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred, the hours described in clause (ii).

(ii) The hours described in this clause are—

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of absence,

except that the total number of hours treated as hours of service under this clause by reason of such pregnancy or placement shall not exceed 501 hours.

(iii) The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph—

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) For purposes of this subparagraph, the term "year" means the period used in computations pursuant to paragraph (2).

(v) A plan may provide that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan

administrator such timely information as the plan may reasonably require to establish—

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(4) Cross references.—

(A) For definitions of "accrued benefit" and "normal retirement age", see sections 1002(23) and (24) of this title;

(B) For effect of certain cash out distributions, see section 1054(d)(1) of this title.

(c) Plan amendments altering vesting schedule

(1)(A) A plan amendment changing any vesting schedule under this plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section unless each participant having not less than 3 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) of this section shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of title 26.

(d) Nonforfeitable benefits after lesser period and in greater amounts than required

A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

(e) Consent for distribution; present value; covered distributions

(1) If the present value of any nonforfeitable benefit with respect to a participant in a plan exceeds $5,000, the plan shall provide that such benefit may not be immediately distributed without the consent of the participant.

(2) For purposes of paragraph (1), the present value shall be calculated in accordance with section 1055(g)(3) of this title.

(3) This subsection shall not apply to any distribution of dividends to which section 404(k) of title 26 applies.

29 U.S.C. § 1054. Benefit accrual requirements

(a) Satisfaction of requirements by pension plans

Each pension plan shall satisfy the requirements of subsection (b)(3) of this section, and—

(1) in the case of a defined benefit plan, shall satisfy the requirements of subsection (b)(1) of this section; and

(2) in the case of a defined contribution plan, shall satisfy the requirements of subsection (b)(2) of this section.

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age

under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(B) A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit and the annual rate at which any individual who is or could be a participant can accrue the retirement benefits payable at normal retirement age under the plan for any later plan year is not more than 133 1/3 percent of the annual rate at which he can accrue benefits for any plan year beginning on or after such particular plan year and before such later plan year. For purposes of this subparagraph—

(i) any amendment to the plan which is in effect for the current year shall be treated as in effect for all other plan years;

(ii) any change in an accrual rate which does not apply to any individual who is or could be a participant in the current year shall be disregarded;

(iii) the fact that benefits under the plan may be payable to certain employees before normal retirement age shall be disregarded; and

(iv) social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after the current year.

(C) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which any participant is entitled upon his separation from the service is not less than a fraction of the annual benefit commencing at normal retirement age to which he would be entitled under the plan as in effect on the date of his separation if he continued to earn annually until normal retirement age the same rate of compensation upon which his normal retirement benefit would be computed under the plan, determined as if he had attained normal retirement age on the date any such determination is made (but taking into account no more than the 10 years of service immediately preceding his separation from service). Such fraction shall be a fraction, not exceeding 1, the numerator of which is the total number of his years of participation in the plan (as of the date of his separation from the service) and the denominator of which is the total number of years he would have participated in the plan if he separated from the service at the normal retirement age. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

(D) Subparagraphs (A), (B), and (C) shall not apply with respect to years of participation before the first plan year to which this section applies but a defined benefit plan satisfies the requirements of this subparagraph with respect to such years of participation only if the accrued benefit of any participant with respect to such years of participation is not less than the greater of—

(i) his accrued benefit determined under the plan, as in effect from time to time prior to September 2, 1974, or

(ii) an accrued benefit which is not less than one-half of the accrued benefit to which such participant would have

been entitled if subparagraph (A), (B), or (C) applied with respect to such years of participation.

(E) Notwithstanding subparagraphs (A), (B), and (C) of this paragraph, a plan shall not be treated as not satisfying the requirements of this paragraph solely because the accrual of benefits under the plan does not become effective until the employee has two continuous years of service. For purposes of this subparagraph, the term "year of service" has the meaning provided by section 1052(a)(3)(A) of this title.

(F) Notwithstanding subparagraphs (A), (B), and (C), a defined benefit plan satisfies the requirements of this paragraph if such plan

(i) is funded exclusively by the purchase of insurance contracts, and

(ii) satisfies the requirements of paragraphs (2) and (3) of section 1081(b) of this title (relating to certain insurance contract plans),

but only if an employee's accrued benefit as of any applicable date is not less than the cash surrender value his insurance contracts would have on such applicable date if the requirements of paragraphs (4), (5), and (6) of section 1081(b) of this title were satisfied.

(G) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the requirements of this paragraph if the participant's accrued benefit is reduced on account of any increase in his age or service. The preceding sentence shall not apply to benefits under the plan commencing before benefits payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] which benefits under the plan—

(i) do not exceed social security benefits, and

(ii) terminate when such social security benefits commence.

(H)(i) Notwithstanding the preceding subparagraphs, a defined benefit plan shall be treated as not satisfying the

requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

(ii) A plan shall not be treated as failing to meet the requirements of this subparagraph solely because the plan imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(iii) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan—

(I) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(II) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title, then any requirement of this subparagraph for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The preceding provisions of this clause shall apply in accordance with regulations of the Secretary of the Treasury.

Such regulations may provide for the application of the preceding provisions of this clause, in the case of any such employee, with respect to any period of time within a plan year.

(iv) Clause (i) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(v) A plan shall not be treated as failing to meet the requirements of clause (i) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(vi) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 shall apply with respect to the requirements of this subparagraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(1)(H).

(2)(A) A defined contribution plan satisfies the requirements of this paragraph if, under the plan, allocations to the employee's account are not ceased, and the rate at which amounts are allocated to the employee's account is not reduced, because of the attainment of any age.

(B) A plan shall not be treated as failing to meet the requirements of subparagraph (A) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(C) Any regulations prescribed by the Secretary of the Treasury pursuant to subparagraphs (B) and (C) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this paragraph in the same manner and to the same extent as such regulations apply with respect to the requirements of such section 411(b)(2).

(3) A plan satisfies the requirements of this paragraph if—

(A) in the case of a defined benefit plan, the plan requires separate accounting for the portion of each employee's accrued benefit derived from any voluntary employee contributions permitted under the plan; and

(B) in the case of any plan which is not a defined benefit plan, the plan requires separate accounting for each employee's accrued benefit.

(4)(A) For purposes of determining an employee's accrued benefit, the term "year of participation" means a period of service (beginning at the earliest date on which the employee is a participant in the plan and which is included in a period of service required to be taken into account under section 1052(b) of this title, determined without regard to section 1052(b)(5) of this title) as determined under regulations prescribed by the Secretary which provide for the calculation of such period on any reasonable and consistent basis.

(B) For purposes of this paragraph, except as provided in subparagraph (C), in the case of any employee whose customary employment is less than full time, the calculation of such employee's service on any basis which provides less than a ratable portion of the accrued benefit to which he would be entitled under the plan if his customary employment were full time shall not be treated as made on a reasonable and consistent basis.

(C) For purposes of this paragraph, in the case of any employee whose service is less than 1,000 hours during any calendar year, plan year or other 12- consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) the calculation of his period of service shall not be treated as not made on a reasonable and consistent basis merely because such service is not taken into account.

(D) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of participation" shall be such period as determined under regulations prescribed by the Secretary.

(E) For purposes of this subsection in the case of any maritime industry, 125 days of service shall be treated as a year of participation. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(c) Employee's accrued benefits derived from employer and employee contributions

(1) For purposes of this section and section 1053 of this title an employee's accrued benefit derived from employer contributions as of any applicable date is the excess (if any) of the accrued benefit for such employee as of such applicable date over the accrued benefit derived from contributions made by such employee as of such date.

(2)(A) In the case of a plan other than a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is—

(i) except as provided in clause (ii), the balance of the employee's separate account consisting only of his contributions and income, expenses, gains, and losses attributable thereto, or

(ii) if a separate account is not maintained with respect to an employee's contributions under such a plan, the amount which bears the same ratio to his total accrued benefit as the total amount of the employee's contributions (less withdrawals) bears to the sum of such contributions and the contributions made on his behalf by the employer (less withdrawals).

(B) DEFINED BENEFIT PLANS.—In the case of a defined benefit plan, the accrued benefit derived from contributions made by an employee as of any applicable date is the amount

equal to the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date).

(C) For purposes of this subsection, the term "accumulated contributions" means the total of—

(i) all mandatory contributions made by the employee,

(ii) interest (if any) under the plan to the end of the last plan year to which section 1053(a)(2) of this title does not apply (by reason of the applicable effective date), and

(iii) interest on the sum of the amounts determined under clauses (i) and (ii) compounded annually—

(I) at the rate of 120 percent of the Federal midterm rate (as in effect under section 1274 of title 26 for the 1st month of a plan year for the period beginning with the 1st plan year to which subsection (a)(2) of this section applies by reason of the applicable effective date) and ending with the date on which the determination is being made, and

(II) at the interest rate which would be used under the plan under section 1055(g)(3) of this title (as of the determination date) for the period beginning with the determination date and ending on the date on which the employee attains normal retirement age.

For purposes of this subparagraph, the term "mandatory contributions" means amounts contributed to the plan by the employee which are required as a condition of employment, as a condition of participation in such plans, or as a condition of obtaining benefits under the plan attributable to employer contributions.

(D) The Secretary of the Treasury is authorized to adjust by regulation the conversion factor described in subparagraph (B) from time to time as he may deem necessary. No such adjustment shall be effective for a plan year beginning before

the expiration of 1 year after such adjustment is determined and published.

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

(4) In the case of a defined benefit plan which permits voluntary employee contributions, the portion of an employee's accrued benefit derived from such contributions shall be treated as an accrued benefit derived from employee contributions under a plan other than a defined benefit plan.

(d) Employee service which may be disregarded in determining employee's accrued benefits under plan

Notwithstanding section 1053(b)(1) of this title, for purposes of determining the employee's accrued benefit under the plan, the plan may disregard service performed by the employee with respect to which he has received—

(1) a distribution of the present value of his entire nonforfeitable benefit if such distribution was in an amount (not more than the dollar limit under section 1053(e)(1) of this title) permitted under regulations prescribed by the Secretary of the Treasury, or

(2) a distribution of the present value of his nonforfeitable benefit attributable to such service which he elected to receive.

Paragraph (1) shall apply only if such distribution was made on termination of the employee's participation in the plan. Paragraph (2) shall apply only if such distribution was made on termination of the employee's participation in the plan or under such other circumstances as may be provided under regulations prescribed by the Secretary of the Treasury.

(e) Opportunity to repay full amount of distributions which have been reduced through disregarded employee service

For purposes of determining the employee's accrued benefit, the plan shall not disregard service as provided in subsection (d) of this section unless the plan provides an opportunity for the participant to repay the full amount of a distribution described in subsection (d) of this section with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section and provides that upon such repayment the employee's accrued benefit shall be recomputed by taking into account service so disregarded. This subsection shall apply only in the case of a participant who—

(1) received such a distribution in any plan year to which this section applies which distribution was less than the present value of his accrued benefit,

(2) resumes employment covered under the plan, and

(3) repays the full amount of such distribution with, in the case of a defined benefit plan, interest at the rate determined for purposes of subsection (c)(2)(C) of this section.

The plan provision required under this subsection may provide that such repayment must be made (A) in the case of a withdrawal on account of separation from service, before the earlier of 5 years after the first date on which the participant is subsequently re-employed by the employer, or the close of the first period of 5 consecutive 1-year breaks in service commencing after the withdrawal; or (B) in the case of any other withdrawal, 5 years after the date of the withdrawal.

(f) Employer treated as maintaining a plan

For the purposes of this part, an employer shall be treated as maintaining a plan if any employee of such employer accrues benefits under such plan by reason of service with such employer.

(g) Decrease of accrued benefits through amendment of plan

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

(3) For purposes of this subsection, any—

(A) tax credit employee stock ownership plan (as defined in section 409(a) of title 26), or

(B) employee stock ownership plan (as defined in section 4975(e)(7) of title 26),

shall not be treated as failing to meet the requirements of this subsection merely because it modifies distribution options in a nondiscriminatory manner.

(h) Notice of significant reduction in benefit accruals

(1) A plan described in paragraph (2) may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to—

(A) each participant in the plan,

(B) each beneficiary who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title), and

(C) each employee organization representing participants in the plan,

except that such notice shall instead be provided to a person designated, in writing, to receive such notice on behalf of any person referred to in subparagraph (A), (B), or (C).

(2) A plan is described in this paragraph if such plan is—

(A) a defined benefit plan, or

(B) an individual account plan which is subject to the funding standards of section 1082 of this title.

(i) Prohibition on benefit increases where plan sponsor is in bankruptcy

(1) In the case of a plan described in paragraph (3) which is maintained by an employer that is a debtor in a case under title 11 or similar Federal or State law, no amendment of the plan which increases the liabilities of the plan by reason of—

(A) any increase in benefits,

(B) any change in the accrual of benefits, or

(C) any change in the rate at which benefits become nonforfeitable under the plan,

with respect to employees of the debtor, shall be effective prior to the effective date of such employer's plan of reorganization.

(2) Paragraph (1) shall not apply to any plan amendment that—

(A) the Secretary of the Treasury determines to be reasonable and that provides for only de minimis increases in the liabilities of the plan with respect to employees of the debtor,

(B) only repeals an amendment described in section 1082(c)(8) of this title,

(C) is required as a condition of qualification under part I of subchapter D of chapter 1 of title 26, or

(D) was adopted prior to, or pursuant to a collective bargaining agreement entered into prior to, the date on which the employer became a debtor in a case under title 11 or similar Federal or State law.

(3) This subsection shall apply only to plans (other than multiemployer plans) covered under section 1321 of this title for which the funded current liability percentage (within the meaning of section 1082(d)(8) of this title) is less than 100 percent after taking into account the effect of the amendment.

(4) For purposes of this subsection, the term "employer" has the meaning set forth in section 1082(c)(11)(A) of this title, without regard to section 1082(c)(11)(B) of this title.

(j) Cross reference

For special rules relating to plan provisions adopted to preclude discrimination, see section 1053(c)(2) of this title.

29 U.S.C. § 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

* * * *

(g) Distribution of present value of annuity; written consent; determination of present value

* * * *

(3) DETERMINATION OF PRESENT VALUE

(A) IN GENERAL.—

(i) PRESENT VALUE.—Except as provided in subparagraph (B), for purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(ii) DEFINITIONS.—For purposes of clause (i)—

(I) APPLICABLE MORTALITY TABLE.—The term "applicable mortality table" means the table prescribed by the Secretary of the Treasury. Such table shall be based on the prevailing commissioners' standard table (described in section 807(d)(5)(A) of title 26) used to determine reserves for group annuity contracts issued on the date as of which present value is being determined (without regard to any other subparagraph of section 807(d)(5) of title 26).

(II) APPLICABLE INTEREST RATE.—The term "applicable interest rate" means the annual rate of interest on 30-year Treasury securities for the month before the date of distribution or such other time as the Secretary of the Treasury may by regulations prescribe.

(B) EXCEPTION.—In the case of a distribution from a plan that was adopted and in effect prior to December 8, 1994, the present value of any distribution made before the earlier of—

(i) the later of when a plan amendment applying subparagraph (A) is adopted or made effective, or

(ii) the first day of the first plan year beginning after December 31, 1999,

shall be calculated, for purposes of paragraphs (1) and (2), using the interest rate determined under the regulations of the Pension Benefit Guaranty Corporation for determining the present value of a lump sum distribution on plan termination that were in effect on September 1, 1993, and using the provisions of the plan as in effect on the day before December 8, 1994; but only if such provisions of the plan met the requirements of this paragraph as in effect on the day before December 8, 1994.

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29 U.S.C. § 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(A) some or all of the participants of which are employees described in section 401(c)(1) of title 26; or

(B) which consists of one or more individual retirement accounts described in section 408 of title 26;

to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of title 26, whichever is applicable.

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this chapter—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 as in effect on January 1, 1995) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the retur of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on initial qualification of the plan under section 401 or 403(a) of title 26, and if the plan receives an adverse determination with respect to its initial qualification, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after such determination, but only if the application for the determination is made by the time prescribed by law for filing the employer's return for the taxable year in which such plan was adopted, or such later date as the Secretary of the Treasury may prescribe.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to the employer within 6 months after the date of such determination.

(d) Termination of plan

(1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

29 U.S.C. § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement—

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement—

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection—

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a

party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C. § 1132. Civil enforcement

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(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

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29 U.S.C. § 1302. Pension Benefit Guaranty Corporation

(a) Establishment within Department of Labor

There is established within the Department of Labor a body corporate to be known as the Pension Benefit Guaranty Corporation. In carrying out its functions under this subchapter, the corporation shall be administered by the chairman of the board of directors in accordance with policies established by the board. The purposes of this subchapter, which are to be carried out by the corporation, are—

(1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,

(2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which this subchapter applies, and

(3) to maintain premiums established by the corporation under section 1306 of this title at the lowest level consistent with carrying out its obligations under this subchapter.

(b) Powers of corporation

To carry out the purposes of this subchapter, the corporation has the powers conferred on a nonprofit corporation under the District of Columbia Nonprofit Corporation Act [D.C.Code, § 29-501 et seq.] and, in addition to any specific power granted to the corporation elsewhere in this subchapter or under that Act, the corporation has the power—

(1) to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal;

(2) to adopt, alter, and use a corporate seal, which shall be judicially noticed;

(3) to adopt, amend, and repeal, by the board of directors, bylaws, rules, and regulations relating to the conduct of its business and the exercise of all other rights and powers granted to it by this chapter and such other bylaws, rules, and regulations as may be necessary to carry out the purposes of this subchapter;

(4) to conduct its business (including the carrying on of operations and the maintenance of offices) and to exercise all other rights and powers granted to it by this chapter in any State or other jurisdiction without regard to qualification, licensing, or other requirements imposed by law in such State or other jurisdiction;

(5) to lease, purchase, accept gifts or donations of, or otherwise to acquire, to own, hold, improve, use, or otherwise deal in or with, and to sell, convey, mortgage, pledge, lease, exchange, or otherwise dispose of, any property, real, personal, or mixed, or any interest therein wherever situated;

(6) to appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required, to determine their qualifications, to define their duties, and, to the extent desired by the corporation, require bonds for them and fix the penalty thereof, and to appoint and fix the compensation of experts and consultants in accordance with the provisions of section 3109 of title 5;

(7) to utilize the personnel and facilities of any other agency or department of the United States Government, with or without reimbursement, with the consent of the head of such agency or department; and

(8) to enter into contracts, to execute instruments, to incur liabilities, and to do any and all other acts and things as may be necessary or incidental to the conduct of its business and the exercise of all other rights and powers granted to the corporation by this chapter.

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29 U.S.C. § 1341. Termination of single-employer plans

(a) General rules governing single-employer plan terminations

(1) Exclusive means of plan termination

Except in the case of a termination for which proceedings are otherwise instituted by the corporation as provided in section 1342 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

(2) 60-day notice of intent to terminate

Not less than 60 days before the proposed termination date of a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section, the plan administrator shall provide to each affected party (other than the corporation in the case of a standard termination) a written notice of intent to terminate stating that such termination is intended and the proposed termination date. The written notice shall include any related additional information required in regulations of the corporation.

(3) Adherence to collective bargaining agreements

The corporation shall not proceed with a termination of a plan under this section if the termination would violate the terms and conditions of an existing collective bargaining agreement. Nothing in the preceding sentence shall be construed as limiting the authority of the corporation to institute proceedings to involuntarily terminate a plan under section 1342 of this title.

(b) Standard termination of single-employer plans

(1) General requirements

A single-employer plan may terminate under a standard termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraphs (A) and (B) of paragraph (2) are met,

(C) the corporation does not issue a notice of noncompliance under subparagraph (C) of paragraph (2), and

(D) when the final distribution of assets occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(2) Termination procedure

(A) Notice to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall send a notice to the corporation setting forth—

(i) certification by an enrolled actuary—

(I) of the projected amount of the assets of the plan (as of a proposed date of final distribution of assets),

(II) of the actuarial present value (as of such date) of the benefit liabilities (determined as of the proposed termination date) under the plan, and

(III) that the plan is projected to be sufficient (as of such proposed date of final distribution) for such benefit liabilities,

(ii) such information as the corporation may prescribe in regulations as necessary to enable the corporation to make determinations under subparagraph (C), and

(iii) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certification under clause (i) is accurate and complete, and

(II) the information provided to the corporation under clause (ii) is accurate and complete.

Clause (i) and clause (iii)(I) shall not apply to a plan described in section 412(i) of title 26.

(B) Notice to participants and beneficiaries of benefit commitments[1]

No later than the date on which a notice is sent by the plan administrator under subparagraph (A), the plan administrator shall send a notice to each person who is a participant or beneficiary under the plan—

(i) specifying the amount of the benefit liabilities (if any) attributable to such person as of the proposed termination date and the benefit form on the basis of which such amount is determined, and

(ii) including the following information used in determining such benefit liabilities:

(I) the length of service,

(II) the age of the participant or beneficiary,

(III) wages,

(IV) the assumptions, including the interest rate, and

(V) such other information as the corporation may require.

Such notice shall be written in such manner as is likely to be understood by the participant or beneficiary and as may be prescribed in regulations of the corporation.

(C) Notice from corporation of noncompliance

(i) In general

Within 60 days after receipt of the notice under subparagraph (A), the corporation shall issue a notice of noncompliance to the plan administrator if—

(I) it determines, based on the notice sent under paragraph (2)(A) of subsection (b) of this section, that

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[1] So in original. Probably should be "benefit liabilities".

there is reason to believe that the plan is not sufficient for benefit liabilities,

(II) it otherwise determines, on the basis of information provided by affected parties or otherwise obtained by the corporation, that there is reason to believe that the plan is not sufficient for benefit liabilities, or

(III) it determines that any other requirement of subparagraph (A) or (B) of this paragraph or of subsection (a)(2) of this section has not been met, unless it further determines that the issuance of such notice would be inconsistent with the interests of participants and beneficiaries.

(ii) Extension

The corporation and the plan administrator may agree to extend the 60-day period referred to in clause (i) by a written agreement signed by the corporation and the plan administrator before the expiration of the 60-day period. The 60-day period shall be extended as provided in the agreement and may be further extended by subsequent written agreements signed by the corporation and the plan administrator made before the expiration of a previously agreed upon extension of the 60-day period. Any extension may be made upon such terms and conditions (including the payment of benefits) as are agreed upon by the corporation and the plan administrator.

(D) Final distribution of assets in absence of notice of noncompliance

The plan administrator shall commence the final distribution of assets pursuant to the standard termination of the plan as soon as practicable after the expiration of the 60-day (or extended) period referred to in subparagraph (C), but such final distribution may occur only if—

(i) the plan administrator has not received during such period a notice of noncompliance from the corporation under subparagraph (C), and

(ii) when such final distribution occurs, the plan is sufficient for benefit liabilities (determined as of the termination date).

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

(4) Continuing authority

Nothing in this section shall be construed to preclude the continued exercise by the corporation, after the termination

date of a plan terminated in a standard termination under this subsection, of its authority under section 1303 of this title with respect to matters relating to the termination. A certification under paragraph (3)(B) shall not affect the corporation's obligations under section 1322 of this title.

(c) Distress termination of single-employer plans

(1) In general

A single-employer plan may terminate under a distress termination only if—

(A) the plan administrator provides the 60-day advance notice of intent to terminate to affected parties required under subsection (a)(2) of this section,

(B) the requirements of subparagraph (A) of paragraph (2) are met, and

(C) the corporation determines that the requirements of subparagraph (B) of paragraph (2) are met.

(2) Termination requirements

(A) Information submitted to the corporation

As soon as practicable after the date on which the notice of intent to terminate is provided pursuant to subsection (a)(2) of this section, the plan administrator shall provide the corporation, in such form as may be prescribed by the corporation in regulations, the following information:

(i) such information as the corporation may prescribe by regulation as necessary to make determinations under subparagraph (B) and paragraph (3);

(ii) unless the corporation determines the information is not necessary for purposes of paragraph (3)(A) or section 1362 of this title, certification by an enrolled actuary of—

(I) the amount (as of the proposed termination date and, if applicable, the proposed distribution date) of the current value of the assets of the plan,

(II) the actuarial present value (as of such dates) of the benefit liabilities under the plan,

(III) whether the plan is sufficient for benefit liabilities as of such dates,

(IV) the actuarial present value (as of such dates) of benefits under the plan guaranteed under section 1322 of this title, and

(V) whether the plan is sufficient for guaranteed benefits as of such dates;

(iii) in any case in which the plan is not sufficient for benefit liabilities as of such date—

(I) the name and address of each participant and beneficiary under the plan as of such date, and

(II) such other information as shall be prescribed by the corporation by regulation as necessary to enable the corporation to be able to make payments to participants and beneficiaries as required under section 1322(c) of this title; and

(iv) certification by the plan administrator that—

(I) the information on which the enrolled actuary based the certifications under clause (ii) is accurate and complete, and

(II) the information provided to the corporation under clauses (i) and (iii) is accurate and complete.

Clause (ii) and clause (iv)(I) shall not apply to a plan described in section 412(i) of title 26.

(B) Determination by corporation of necessary distress criteria

Upon receipt of the notice of intent to terminate required under subsection (a)(2) of this section and the information required under subparagraph (A), the corporation shall determine whether the requirements of this subparagraph are met as provided in clause (i), (ii), or (iii). The requirements of this subparagraph are met if each person who is (as of the proposed termination date) a contributing sponsor of such plan or a member of such sponsor's controlled group meets the requirements of any of the following clauses:

(i) Liquidation in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed or has had filed against such person, as of the proposed termination date, a petition seeking liquidation in a case under title 11, or under any similar Federal law or law of a State or political subdivision of a State (or a case described in clause (ii) filed by or against such person has been converted, as of such date, to a case in which liquidation is sought), and

(II) such case has not, as of the proposed termination date, been dismissed.

(ii) Reorganization in bankruptcy or insolvency proceedings

The requirements of this clause are met by a person if—

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization in a case under Title 11, or under any similar law of a State or political subdivision of a State (or a case described in clause (i) filed by or against such person has been converted, as of such date, to such a case in which reorganization is sought),

(II) such case has not, as of the proposed termination date, been dismissed,

(III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and

(IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

(iii) Termination required to enable payment of debts while staying in business or to avoid unreasonably burdensome pension costs caused by declining workforce

The requirements of this clause are met by a person if such person demonstrates to the satisfaction of the corporation that—

(I) unless a distress termination occurs, such person will be unable to pay such person's debts when due and will be unable to continue in business, or

(II) the costs of providing pension coverage have become unreasonably burdensome to such person, solely as a result of a decline of such person's workforce covered as participants under all single-employer plans of which such person is a contributing sponsor.

(C) Notification of determinations by the corporation

The corporation shall notify the plan administrator as soon as practicable of its determinations made pursuant to subparagraph (B).

(3) Termination procedure

(A) Determinations by corporation relating to plan sufficiency for guaranteed benefits and for benefit liabilities

If the corporation determines that the requirements for a distress termination set forth in paragraphs (1) and (2) are met, the corporation shall—

(i) determine that the plan is sufficient for guaranteed benefits (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation,

(ii) determine that the plan is sufficient for benefit liabilities (as of the termination date) or that the corporation is unable to make such determination on the basis of information made available to the corporation, and

(iii) notify the plan administrator of the determinations made pursuant to this subparagraph as soon as practicable.

(B) Implementation of termination

After the corporation notifies the plan administrator of its determinations under subparagraph (A), the termination of the plan shall be carried out as soon as practicable, as provided in clause (i), (ii), or (iii).

(i) Cases of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for benefit liabilities, the plan administrator shall proceed to distribute the plan's assets,

and make certification to the corporation with respect to such distribution, in the manner described in subsection (b)(3) of this section, and shall take such other actions as may be appropriate to carry out the termination of the plan.

(ii) Cases of sufficiency for guaranteed benefits without a finding of sufficiency for benefit liabilities

In any case in which the corporation determines that the plan is sufficient for guaranteed benefits, but further determines that it is unable to determine that the plan is sufficient for benefit liabilities on the basis of the information made available to it, the plan administrator shall proceed to distribute the plan's assets in the manner described in subsection (b)(3) of this section, make certification to the corporation that the distribution has occurred, and take such actions as may be appropriate to carry out the termination of the plan.

(iii) Cases without any finding of sufficiency

In any case in which the corporation determines that it is unable to determine that the plan is sufficient for guaranteed benefits on the basis of the information made available to it, the corporation shall commence proceedings in accordance with section 1342 of this title.

(C) Finding after authorized commencement of termination that plan is unable to pay benefits

(i) Finding with respect to benefit liabilities which are not guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized under subparagraph (B)(i), the plan administrator finds that the plan is unable, or will be unable, to pay benefit liabilities which are not benefits guaranteed by the corporation under section 1322 of this

title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter.

(ii) Finding with respect to guaranteed benefits

If, after the plan administrator has begun to terminate the plan as authorized by subparagraph (B)(i) or (ii), the plan administrator finds that the plan is unable, or will be unable, to pay all benefits under the plan which are guaranteed by the corporation under section 1322 of this title, the plan administrator shall notify the corporation of such finding as soon as practicable thereafter. If the corporation concurs in the finding of the plan administrator (or the corporation itself makes such a finding), the corporation shall institute appropriate proceedings under section 1342 of this title.

(D) Administration of the plan during interim period

(i) In general

The plan administrator shall—

(I) meet the requirements of clause (ii) for the period commencing on the date on which the plan administrator provides a notice of distress termination to the corporation under subsection (a)(2) of this section and ending on the date on which the plan administrator receives notification from the corporation of its determinations under subparagraph (A), and

(II) meet the requirements of clause (ii) commencing on the date on which the plan administrator or the corporation makes a finding under subparagraph (C)(ii).

(ii) Requirements

The requirements of this clause are met by the plan administrator if the plan administrator—

(I) refrains from distributing assets or taking any other actions to carry out the proposed termination under this subsection,

(II) pays benefits attributable to employer contributions, other than death benefits, only in the form of an annuity,

(III) does not use plan assets to purchase irrevocable commitments to provide benefits from an insurer, and

(IV) continues to pay all benefit liabilities under the plan, but, commencing on the proposed termination date, limits the payment of benefits under the plan to those benefits which are guaranteed by the corporation under section 1322 of this title or to which assets are required to be allocated under section 1344 of this title.

In the event the plan administrator is later determined not to have met the requirements for distress termination, any benefits which are not paid solely by reason of compliance with subclause (IV) shall be due and payable immediately (together with interest, at a reasonable rate, in accordance with regulations of the corporation).

(d) Sufficiency

For purposes of this section—

(1) Sufficiency for benefit liabilities

A single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under the plan.

(2) Sufficiency for guaranteed benefits

A single-employer plan is sufficient for guaranteed benefits if there is no amount of unfunded guaranteed benefits under the plan.

(e) Limitation on conversion of a defined benefit plan to defined contribution plan.

The adoption of an amendment to a plan which causes the plan to become a plan described in section 1321(b)(1) of this title constitutes a termination of the plan. Such an amendment may take effect only after the plan satisfies the requirements for standard termination under subsection (b) of this section or distress termination under subsection (c) of this section.

29 U.S.C. § 1342. Institution of termination proceedings by the corporation

(a) Authority to institute proceedings to terminate a plan

The corporation may institute proceedings under this section to terminate a plan whenever it determines that—

(1) the plan has not met the minimum funding standard required under section 412 of title 26, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of title 26 has been mailed with respect to the tax imposed under section 4971(a) of title 26,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 1343(c)(7) of this title has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated. The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan.

The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and

beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c) of this section). Notwithstanding any other provision of this subchapter, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as it determines to be appropriate in the administration of this subchapter.

(b) Appointment of trustee

(1) Whenever the corporation makes a determination under subsection (a) of this section with respect to a plan or is required under subsection (a) of this section to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) of this section ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this subchapter—

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(B) upon the petition of the corporation, the appropriate United States district court shall appoint a trustee proposed by the corporation for a multiemployer plan which is in reorganization or to which section 1341a(d) of this title applies, unless such appointment would be adverse to the interests of the plan participants and beneficiaries in the aggregate.

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated

If the corporation is required under subsection (a) of this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) of this section disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) of this section (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) of this section and, in

addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3) of this section. Whenever a trustee appointed under this subchapter is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution.

(3)[1] In the case of a proceeding initiated under this section, the plan administrator shall provide the corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 1341(c)(2)(A) of this title.

(d) Powers of trustee

(1)(A) A trustee appointed under subsection (b) of this section shall have the power—

(i) to do any act authorized by the plan or this subchapter to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

(v) in the case of a multiemployer plan, to reduce benefits or suspend benefit payments under the plan, give appropriate notices, amend the plan, and perform other acts required or

[1] So in original. No pars. (1) and (2) have been designated.

authorized by subtitle (E) of this subchapter to be performed by the plan sponsor or administrator;

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, any contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan.

If the court to which application is made under subsection (c) of this section dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) of this section, within 30 days after the date on which the trustee is appointed under subsection (b) of this section, the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of subchapter I of this chapter (except as provided in subsection (d)(1)(A)(v) of this section). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which an application is made under subsection (c) of this section issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power—

(i) to pay benefits under the plan in accordance with the requirements of this subchapter;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 1082 of this title or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this subchapter;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 1345(a) of this title; and

(viii) to do such other acts as may be necessary to comply with this subchapter or any order of the court and to protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this subchapter to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means—

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 1362, 1363, or 1364 of this title,

(D) each employer who is or may be liable to the plan under section[2] part 1 of subtitle E of this subchapter,

[2] So in original.

(E) each employer who has an obligation to contribute, within the meaning of section 1392(a) of this title, under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this chapter, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 1002 of this title and under section 4975(e) of title 26 (except to the extent that the provisions of this subchapter are inconsistent with the requirements applicable under part 4 of subtitle B of subchapter I of this chapter and of such section 4975).

(e) Filing of application notwithstanding pendency of other proceedings

An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against property of the plan.

(f) Exclusive jurisdiction; stay of other proceedings

Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11. Pending an adjudication under subsection (c) of this section such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce a lien against property of the plan or any other suit against the plan.

(g) Venue

An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee

(1) The amount of compensation paid to each trustee appointed under the provisions of this subchapter shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

29 U.S.C. § 1344. Allocation of assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

(1) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the plan which were not mandatory contributions.

(2) Second, to that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions.

(3) Third, in the case of benefits payable as an annuity—

(A) in the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the plan, to each such benefit, based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least,

(B) in the case of a participant's or beneficiary's benefit (other than a benefit described in subparagraph (A)) which would have been in pay status as of the beginning of such 3-year period if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of annuity under the plan) as of the beginning of such period, to each such benefit based on the provisions of the plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For purposes of subparagraph (A), the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(4) Fourth—

(A) to all other benefits (if any) of individuals under the plan guaranteed under this subchapter (determined without regard to section 1322b(a) of this title), and

(B) to the additional benefits (if any) which would be determined under subparagraph (A) if section 1322(b)(5) of this title did not apply.

For purposes of this paragraph, section 1321 of this title shall be applied without regard to subsection (c) thereof.

(5) Fifth, to all other nonforfeitable benefits under the plan.

(6) Sixth, to all other benefits under the plan.

(b) Adjustment of allocations; reallocations; mandatory contributions; establishment of subclasses and categories

For purposes of subsection (a) of this section—

(1) The amount allocated under any paragraph of subsection (a) of this section with respect to any benefit shall be properly adjusted for any allocation of assets with respect to that benefit under a prior paragraph of subsection (a) of this section.

(2) If the assets available for allocation under any paragraph of subsection (a) of this section (other than paragraphs (5) and (6)) are insufficient to satisfy in full the benefits of all individuals which are described in that paragraph, the assets shall be allocated pro rata among such individuals on the basis of the present value (as of the termination date) of their respective benefits described in that paragraph.

(3) This paragraph applies if the assets available for allocation under paragraph (5) of subsection (a) of this section are not sufficient to satisfy in full the benefits of individuals described in that paragraph.

(A) If this paragraph applies, except as provided in subparagraph (B), the assets shall be allocated to the benefits of individuals described in such paragraph (5) on the basis of the benefits of individuals which would have been described in such paragraph (5) under the plan as in effect at the beginning of the 5-year period ending on the date of plan termination.

(B) If the assets available for allocation under subparagraph (A) are sufficient to satisfy in full the benefits described in such subparagraph (without regard to this subparagraph), then for purposes of subparagraph (A), benefits of individuals described in such

subparagraph shall be determined on the basis of the plan as amended by the most recent plan amendment effective during such 5-year period under which the assets available for allocation are sufficient to satisfy in full the benefits of individuals described in subparagraph (A) and any assets remaining to be allocated under such subparagraph shall be allocated under subparagraph (A) on the basis of the plan as amended by the next succeeding plan amendment effective during such period.

(4) If the Secretary of the Treasury determines that the allocation made pursuant to this section (without regard to this paragraph) results in discrimination prohibited by section 401(a)(4) of title 26 then, if required to prevent the disqualification of the plan (or any trust under the plan) under section 401(a) or 403(a) of title 26, the assets allocated under subsections (a)(4)(B), (a)(5), and (a)(6) of this section shall be reallocated to the extent necessary to avoid such discrimination.

(5) The term "mandatory contributions" means amounts contributed to the plan by a participant which are required as a condition of employment, as a condition of participation in such plan, or as a condition of obtaining benefits under the plan attributable to employer contributions. For this purpose, the total amount of mandatory contributions of a participant is the amount of such contributions reduced (but not below zero) by the sum of the amounts paid or distributed to him under the plan before its termination.

(6) A plan may establish subclasses and categories within the classes described in paragraphs (1) through (6) of subsection (a) of this section in accordance with regulations prescribed by the corporation.

(c) Increase or decrease in value of assets

Any increase or decrease in the value of the assets of a single-employer plan occurring during the period beginning on the later of (1) the date a trustee is appointed under section

1342(b) of this title or (2) the date on which the plan is terminated is to be allocated between the plan and the corporation in the manner determined by the court (in the case of a court-appointed trustee) or as agreed upon by the corporation and the plan administrator in any other case. Any increase or decrease in the value of the assets of a single-employer plan occurring after the date on which the plan is terminated shall be credited to, or suffered by, the corporation.

(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 1058 of this title occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of title 26.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying—

(i) the market value of the total remaining assets, by

(ii) a fraction—

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date—

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of title 26 (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990) or section 1104(d) of this title with respect to any distribution of residual assets of a single-employer plan to the employer.

26 C.F.R. § 1.414(l)-1 Mergers and consolidations of plans or transfers of plan assets.

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(2) *General rule*. Under section 414(l),

(i) A trust which forms a part of a plan will not constitute a qualified trust under section 401, and

(ii) A plan will not be treated as being qualified under section 403(a) and 405(a), unless, in the case of a merger or consolidation (as defined in paragraph (b)(2) of this section), or a transfer of assets or liabilities (as defined in paragraph (b)(3) of this section), the following condition is satisfied. This condition requires that each participant receive benefits on a

termination basis (as defined in paragraph (b)(5) of this section) from the plan immediately after the merger, consolidation or transfer which are equal to or greater than the benefits the participant would receive on a termination basis immediately before the merger, consolidation, or transfer.

(b) *Definitions*. For purposes of this section:

(1) *Single plan*. A plan is a "single plan" if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. For purposes of the preceding sentence, all the assets of a plan will not fail to be available to provide all the benefits of a plan merely because the plan is funded in part or in whole with allocated insurance instruments. A plan will not fail to be a single plan merely because of the following:

(i) The plan has several distinct benefit structures which apply either to the same or different participants,

(ii) The plan has several plan documents,

(iii) Several employers, whether or not affiliated, contribute to the plan,

(iv) The assets of the plan are invested in several trusts or annuity contracts, or

(v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plan.

However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan.

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(c) *Application of section 414(l)*—(1) *Two or more plans*. (i) Section 414(l) does not apply unless more than a single plan is involved. It also does not apply

unless at least a single plan assumes liabilities from another plan or obtains assets from another plan (as in a merger or spinoff). For purposes of section 414(l), a transfer of assets or liabilities will not be deemed to occur merely because a defined contribution plan is amended to become a defined benefit plan. This rule will apply even if, under the facts and circumstances of a particular case, a termination of the defined contribution plan will be considered to have occurred for purposes of other provisions of the Code.

(ii) The requirements of this subparagraph may be illustrated as follows:

Example. After acquiring Corporation B, Corporation A amends Corporation B's defined benefit plan (Plan B) to provide the same benefits as Corporation A's defined benefit plan (Plan A). The assets of Plan B are transferred to the trust containing the assets of Plan A in such a manner that the assets of each plan: (1) are separately accounted for, and (2) are not available to pay benefits of the other plan. Because of condition (2) there are still two plans and, therefore, a merger did not occur. As a result, section 414(l) does not apply. If at some later date Corporation A were to sell Corporation B and transfer the assets of Plan B that were separately accounted for to another trust or to an annuity contract solely for the purpose of providing Plan B's benefits, this transfer would also not involve section 414(l). This is so because Plan B was a separate plan before the entire transaction and because no plan assumed liabilities or obtained assets from another plan. If, on the other hand, Corporation A merged Plan A and Plan B at the time of the acquisition of Corporation B by deleting condition (2) above, then section 414(l) would apply both to the merger of Plan A and Plan B and to the spinoff of Plan B from the merged plan. The spinoff would have to satisfy the requirements of paragraph (n) of this section, even if the assets attributable to Plan A and Plan B were separately accounted for in order to allocate funding costs.

****

29 C.F.R. § 4041.1 Purpose and scope.

This part sets forth the rules and procedures for terminating a single-employer plan in a standard or distress termination under section 4041 of ERISA, the exclusive means of voluntarily terminating a plan.

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

COMPLAINT FOR ENFORCEMENT OF RIGHTS UNDER ERISA

Plaintiffs, by their undersigned attorneys, complain as follows:

NATURE OF THE ACTION

1. This is a class action for breach of statutory and fiduciary duties and to enforce the rights of pension plan participants arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 USC §§ 1001 et.seq. and under the terms of the plan. The Plaintiffs, retired participants in the defendant Hughes Non-Bargaining Retirement Plan (the "Plan"), seek an order and judgment declaring that they have a vested right to all or a portion of the excess Plan assets and requiring the Defendants to utilize all or a portion of such excess Plan assets to provide plaintiffs and the class they represent with improved pension benefits,

together with an award of attorney's fees and the costs of the action.

2. Plaintiffs and the class they represent, during the term of their active employment with Hughes, made periodic mandatory contributions to the Plan. Over the years, as a result of these employee and employer contributions and of investment growth earned by the contributions, a substantial surplus accumulated in the Plan, that is, the value of the Plan assets far exceeded the pension liabilities.

3. As a result of this accumulated excess Hughes, after being acquired by the General Motors Corporation, ceased making contributions to the Plan and has not made any contributions since 1986, utilizing excess Plan assets to meet its funding obligations. During the same period of time that Hughes made no contributions, participating active employees were required to continue to make contributions to the Plan and are required to continue to do so to date. Effective January 1, 1991, Hughes created a new non-contributory plan and terminated new enrollment in the contributory Plan.

4. Plaintiffs contend that the exclusive utilization of the excess pension assets by the defendants for their sole use and benefit is in violation of various provisions of ERISA and part of an unlawful plan to obtain for Hughes' own use, Plan assets belonging to and dedicated to the exclusive benefit of plaintiffs and the class they represent. Plaintiffs' further contend that the Plan was terminated on January 1, 1991, entitling the participants to an equitable distribution of the surplus assets in the form of improved benefits.

PARTIES

5. Defendant Hughes Aircraft Company ("Hughes") is a corporation which does business at Tucson, Arizona.

6. Defendant Hughes Non-Bargaining Retirement Plan (the "Plan"), is an employee benefit pension plan as defined in Section 2(3) of ERISA, 29 U.S.C. § 1002(3). The Plan does business in Tucson, Arizona. The Plan is sponsored by Hughes

which is an employer, employee benefit plan sponsor and plan administrator pursuant to Section 3(5) and (16) of ERISA, 29 U.S.C. § 1002(5) and (16).

7. Plaintiffs Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernest O. Blandin and Richard E. Hook are retired employees of Hughes and are participants in and beneficiaries of the Plan as defined in Section 3(7) and (8) of ERISA, 29 U.S.C. §§ 1002(7) and (8). Plaintiffs reside in Tucson, Arizona.

JURISDICTION AND VENUE

8. The Court has jurisdiction pursuant to Sections 409(a) and 502(a), (e) of ERISA, 29 U.S.C. § 1114(a) and, 1132(a), (e) and under 28 U.S.C. §§ 1331 and 1337.

9. Venue is proper pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2) because the Plan does business and the Defendants reside or may be found in this District.

CLASS ACTION ALLEGATIONS

10. This action is commenced pursuant to Fed. Rules Civil Pro. Rule 23(b)(1) & (2) as a class action on behalf of a class consisting of all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan.

11. The class members are so numerous that joinder of all persons is impracticable. The class consists of over 10,000 members. There are questions of law and fact common to the class such as (a) whether a termination of the Plan has occurred requiring the equitable distribution of surplus assets to Plan participants; and (b) whether defendants have breached their fiduciary obligations under ERISA by utilizing surplus Plan assets attributable to employee contributions for the sole and exclusive benefit of Hughes rather than for the benefit of Plan participants.

12. The claims of the representative parties are typical of the claims of the classes, and the representative parties will fairly and adequately represent the interests of the classes.

Plaintiffs Stanley Jacobson, Daniel Welsh, Robert E. McMillin, Ernest O. Blandin and Richard E. Hook are participants in the Pension Plan. They were all employed by Hughes for over 5 years prior to their retirements. Their claims are typical of those of the class members.

MATERIAL FACTS

13. Hughes is an aerospace and electronics systems manufacturing company. It was acquired by the General Motors Corporation in 1985 and became a subsidiary of the GM Hughes Electronics Corporation which is a wholly owned subsidiary of the General Motors Corporation.

14. The Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1955, and subsequently amended from time to time. The other plan resulting from the split is the Hughes Bargaining Retirement Plan.

15. The Plan is governed and its terms are evidenced by an agreement executed by Hughes on or about January 1, 1980 and thereafter amended from time to time. The Plan is a qualified pension plan which is intended to comply with the provisions of ERISA and of Section 401 and other applicable provisions of the Internal Revenue Code.

16. Effective January 1, 1991 the Plan was terminated and replaced by a new non-contributory plan covering all non-bargaining employees employed after August 1, 1990 and all non-bargaining employees employed prior to August 1, 1990 who elected not to participate in the Plan. The termination of the contributory Plan and the terms of the new non-contributory plan are evidenced by a document executed by Hughes on April 4, 1991.

17. The Plan provides retirement benefits to eligible retired non-bargaining (non-union) Hughes employees who participated in the Plan and to their eligible beneficiaries, including the plaintiffs.

18. Under the terms of Section 3.4 of the Plan, as a condition of admission to and continued active participation in the Plan, each participant was required to make a contribution to the Plan. In most instances, such contributions were withheld from the participants' pay by the company during each payroll period.

19. Under the terms of Section 3.1 of the Plan, the cost of benefits under the Plan, to the extent not provided by contributions of Participants as provided by contributions of the company not less than in such amounts and at such times as are necessary to fund benefits under the Plan.

20. Under the terms of Section 3.7 of the Plan the administrator is required to maintain a participant Contributions Account for each participant who has made contributions to the Plan.

21. Commencing in 1974 (the year ERISA was enacted) the following contributions to the Plan were made by the active participants and by the company:

Plan Year	Employee	Employer
1974	13,621,214	27,242,428
1975	15,462,525	36,338,253
1976	19,955,945	50,575,021
1977	18,086,393	49,643,953
1978	20,701,322	65,044,140
1979	22,552,274	60,609,646
1980	22,606,766	59,789,473
1981	26,088,475	82,512,517
1982	30,882,960	47,137,426
1983	36,292,781	92,571,925

Plan Year	Employee	Employer
1984	39,265,444	82,300,148
1985	38,718,786	24,139,676
1986	30,359,559	20,782,539
1987	44,981,446	0
1988	43,245,527	0
1989	47,317,008	0
1990	42,915,410	0
TOTAL	**513,053,835**	**698,687,145**

22. At the end of the 1990 Plan year (December 31, 1990) employee contributions since 1974 totaled \$513,053,835 and employer contributions totaled \$698,687,145.

23. As a result of these contributions and of investment growth of both employer and employee contributions to the Plan, a very substantial overfunding has occurred. By the end of 1985 Plan year assets exceeded the actuarial (present value of accrued benefits) (PVAB) by almost one billion (\$1,000,000,000) dollars. As of December 31, 1986, the current value of assets accumulated in the Plan was \$2,840,371,000 whereas the present value of accumulated benefits (vested and non-vested) was \$1,732,124,000 leaving a surplus in excess of one billion (\$1,000,000,000) dollars. The following shows the net Plan assets (assets available for benefits) and benefit liabilities (present value of accumulated benefits, vested and non-vested) since 1986 at the beginning of each Plan year:

Plan Year	Net Assets	PVAB	Excess
1986	2,421,752,000	1,448,529,000	973,223,000
1987	2,840,371,000	1,732,124,000	1,108,247,000
1988	2,993,728,000	1,833,520,000	1,160,208,000
1989	3,286,400,000	2,095,377,000	1,191,023,000
1990	3,853,602,000	2,644,837,000	1,208,765,000

24. At the time General Motors acquired Hughes, on December 31, 1985, the Plan already had accumulated a substantial overfunding. At the same time, the General Motors retirement plan was enormously underfunded. GM's current plan underfunding exceeded seven billion (\$7,000,000,000) dollars and was listed by the Pension Benefit Guaranty Corporation as one of the most underfunded pension plans in the country.

25. Shortly after GM acquired control, Hughes ceased making any contributions to the Plan. No Hughes contributions were made from 1986 to the 1990 Plan year. During the same period of time Hughes has continued to require employee contributions. Hughes, under GM's control, has in effect utilized the surplus Plan assets to meet its funding obligations even though a substantial portion of that surplus was generated by employee contributions and their earnings.

26. In 1989 Hughes amended the Plan to provide for an Operational Transition Plan (OTP) wihich provided significant additional retirement benefits out of Plan assets to certain eligible employees. The purpose of the OTP was to induce certain active employed Plan participants to elect early retirement so as to reduce the workforce and Hughes payroll costs. OTP benefits were made available only to participants who were active employees at the time of the adoption of the

OTP amendment who met certain arbitrary requirements established by Hughes and were not made available to employees who retired prior to the adoption of the OTP amendment or who did not meet the arbitrary requirements.

27. In 1990, Hughes announced that it was creating a new non-contributory retirement plan, effective January 1, 1991, for non-bargaining employees and terminating future enrollment in the contributory Plan. All new salaried employees will automatically become participants in the new non-contributory plan and active employees who were participants in the contributory Plan were given the option of becoming participants in the new non-contributory plan. Active salaried employees who were not participants in the contributory Plan were given the option of joining the Plan or automatically becoming participants in the new non-contributory plan. Effective January 1, 1991 no new participants will be enrolled in the contributory Plan.

28. The retirement benefits provided under the new non-contributory plan are significantly less costly than the benefits provided under the contributory Plan.

29. By creating such a new non-contributory plan Hughes will not have to make any further contributions on behalf of participants of the contributory Plan as the assets of the Plan are substantially in excess of those required to fund all current and future pensions of participants of the contributory Plan.

30. Hughes will not be required to make any further contributions to fund benefits of participants of the contributory Plan but may instead improperly attempt to utilize such surplus Plan assets to fund benefits of participants in the new non-contributory plan.

AS FIRST CAUSE OF ACTION
PURSUANT TO SECTION 403(c)(1) OF ERISA

31. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) provides that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries.

32. Defendants have violated Section 403 of ERISA by utilizing excess Plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of plaintiffs and the class they represent.

AS A SECOND CAUSE OF ACTION
PURSUANT TO SECTION 404 OF ERISA

33. Defendants owe Plaintiffs and the class they represent the fiduciary duty pursuant to ERISA § 404, (a)(1)(A)(B) 29 U.S.C. § 1104, (A)(1)(A)(B) to discharge their duties for the exclusive purpose of providing benefits to participants and their beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

34. Defendants breached their fiduciary duty to the plaintiffs and the class they represent by utilizing excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of defendant Hughes rather than for the benefit of Plan participants and their beneficiaries.

AS A THIRD CAUSE OF ACTION
PURSUANT TO ERISA § 1033 & 1034

35. ERISA § 203(a), 29 USC § 1053(a), requires that employees be 100% vested in their *own contributions* to a pension plan and that pursuant to 29 U.S.C. § 1053(a)(1), "an

employee's rights in his accrued benefits derived from his own contributions are non-forfeitable."

36. Defendants violated ERISA § 203 by using assets attributable to employees own contributions to meet defendants funding obligations and have therefore caused a divestiture and forfeiture of rights.

AS A FOURTH CAUSE OF ACTION
PURSUANT TO ERISA § 4404

37. ERISA § 4404, 29 U.S.C. § 1344 provides for the distribution of excess plan assets attributable to employer and employees contribution in the event that a plan is terminated.

38. ERISA § 4404(d)(3)(B)), 29 USC § 1344(d)(3) (B), provides that all residual assets attributable to employee contributions must be distributed to employees.

39. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(1)), provides that the Employer may revert excess assets to itself only if:

i. All liabilities of the plan have been satisfied;

ii. The distribution does not contravene any provision; and

iii. The plan provides for such reversion.

40. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(2)(A) (B) (the "Pension Protection Act") provides that any amendment to the plan which permits reversion of surplus assets to the employer upon termination of the plan or increases the amount of the reversion shall not be effective until five years after the amendment was adopted (unless the plan is less than 5 years old in which case if the plan always had the reversion provision it is effective).

41. Under the provisions of ERISA § 4404(D)(3)(A), 29 U.S.C. § 1344(d)(3)(A), before any surplus Plan assets can be distributed to the employer any surplus assets attributable to employee contributions must first be "equitably distributed" to

the employees who made the contributions or to their beneficiaries.

42. Defendants, by creating a new non-contributory plan for all salaried employees employed on or after January 1, 1991 and for all salaried employees employed prior to January 1, 1991 who did not elect to participate in the Plan have, effective January 1, 1991 terminated the Plan within the meaning of ERISA § 4404, 29 USC § 1344 and as such are required to distribute excess assets attributable to employee contribution to the Plan participants in accordance with ERISA § 4404, 29 USC § 1344.

43. The Plan does not contain any provision for reversion of excess assets to the employer upon termination and therefore all excess assets attributable to employer contributions must also be distributed to the participants.

AS AND FOR A FIFTH CAUSE OF ACTION
PURSUANT TO § 403-405 OF ERISA

44. ERISA §§ 403, 404 & 405, 29 USC §§ 1103, 1104 & 1105 impose certain fiduciary duties upon plan fiduciaries.

45. ERISA § 403(c)(1), 29 USC § 1103(c)(1) requires that plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

46. ERISA § 404(1)(A), 29 USC § 1104(1)(A) provides that plan fiduciaries shall expend fund assets for the exclusive purpose of "providing benefits to participant and their beneficiaries" and for "defraying reasonable expenses of administering the plan."

47. ERISA 406(a)(1)(D), 29 USC § 1106(a)(1)(D) prohibits plan fiduciaries to "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan."

48. Section 6.5(b) of the Plan provides that no amendment shall be made at any time under which any part of the Trust

Fund may be diverted to purposes other than for the exclusive benefit of the participants and their beneficiaries.

49. The defendants intend to divert assets of the Plan to pay benefits to participants of the new non-contributory plan who are not participants in the Plan.

50. Paying benefits from assets of the Plan to persons who are not participants of the Plan would be in violation of ERISA §§ 403 and 404, 29 USC §§ 1103 and 1104 and of Section 6.5(d) of the Plan which prohibit using Plan assets for anyone other than Plan participants and their beneficiaries.

51. Paying benefits from assets of the Plan to participants of the new non-contributory plan constitutes a unlawful transfer of assets from the Plan to the new plan for the benefit of defendant Hughes, a party in interest as defined in ERISA § 3(14), 29 USC § 1002(14), which, under the terms of the new non-contributory plan, is required to fund all such benefits. Such a transfer of assets is prohibited by ERISA § 406(a)(1)(D), 29 USC § 1106(a)(1)(D).

AS AND FOR A SIXTH CAUSE OF ACTION
<u>PURSUANT TO ARTICLE V § 5.2 OF THE PLAN</u>

52. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1) (D) provides that the plan fiduciaries shall carry out their duties "in accordance with the documents and instruments governing the plan."

53. ERISA § 502(a)(1)(B) provides, in part, that a plan participant or beneficiary may bring an action to "enforce his rights under the terms of the plan."

54. Article V § 5.2 of the Plan provides in relevant part that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan."

55. Defendants provided OTP benefits out of Plan assets in a discriminatory manner by making such benefits available only to certain participants who were active employees of

Hughes at the time of the adoption of the OTP amendment and not to existing retirees and certain other Plan participants. Defendants, by providing OTP benefits in such a discriminatory manner, breached the terms of Article V § 5.2 of the Plan and of ERISA.

<u>RELIEF</u>

56. Wherefore Plaintiffs request a judgment against the Defendants:

a. Equitably distributing all excess Plan assets attributable to employer contributions to the Plan participants in the form of improved benefits;

b. Equitably distributing all excess Plan assets attributable to employee contributions to Plan participants in the form of improved benefits;

c. Enjoining the defendants from using or diverting any assets of the Plan for the purposes of paying benefits under or administering the non-contributory plan;

d. Appointing a neutral trustee to administer the Plan in accordance with the provisions of ERISA and the judgment of this Court;

e. Ordering the defendant Hughes Aircraft Company to restore to the Plan all Plan assets used to pay OTP benefits and/or pension benefits to persons who are not participants of the contributory Plan.

f. Awarding plaintiffs reasonable attorneys fees, costs and disbursements incurred in connection with the prosecution of this action;

g. Granting such other and further relief as the Court deems equitable, just and proper.

<u>SERVICE REQUIRED BY ERISA</u>

57. A copy of this Complaint has been served on the Secretary of Labor and Secretary of the Treasury pursuant to Section 502(h) of ERISA, 29 U.S.C. § 1132(h).

Dated: New York, New York
January 17, 1992

Yours, etc.
JEROME TAUBER, A Member of
SIPSER, WEINSTOCK, HARPER & DORN

/s/ Jerome Tauber
JEROME TAUBER

- and -

SALLY HART WILSON, of
BOGUTZ AND GORDON, P.C.

/s/ Sally Hart Wilson
SALLY HART WILSON
Attorneys for Plaintiffs

APPENDIX H

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CIV-92-031-TUC JMR

DECLARATION OF ANN L. VERHEY IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS, FOR A MORE DEFINITE STATEMENT AND TO STRIKE PORTIONS OF THE COMPLAINT

I, Ann L. Verhey, hereby declare as follows:

1. I am a citizen of the United States and a resident of Los Angeles, California. I am presently employed by Hughes Aircraft Company ("Hughes") in the position of Assistant Treasurer, and I have been employed by Hughes since 1983. I have either personal knowledge of or access to records containing the facts set forth in this Declaration and, if called as a witness, could and would competently testify about them under oath.

2. I have held the position of Assistant Treasurer at Hughes since January 1988. In this position I am responsible for administering the financial aspects of Hughes' benefit and

insurance programs, including the retirement plan for non-bargaining employees. Records concerning the Hughes Non-Bargaining Retirement Plan (the "Plan"), including copies of the Plan itself and its amendments, are maintained under my direction and control. These records are maintained in the ordinary course of business and I utilize these records in performing my functions for Hughes.

3. Attached hereto as Exhibit "1" and incorporated herein by this reference is a true and correct copy of the Hughes Non-Bargaining Retirement Plan as it existed in 1990, or just prior to the amendments which became effective January 1, 1991. At the end of 1990 the Plan consisted of the Plan executed on October 30, 1985, an amendment executed on December 23, 1986, an amendment executed on March 29, 1988, and an amendment executed on November 28, 1989. The Plan is a defined benefit plan and, as of 1990, provided a contributory benefit structure only.

4. Attached hereto as Exhibit "2" and incorporated herein by this reference is a true and correct copy of the Hughes Non-Bargaining Retirement Plan as amended effective January 1, 1991. The Plan as executed on April 4, 1991, remains a single defined benefit plan and is amended to provide two benefit structures, one of which is a contributory benefits structure and the other of which is a non-contributory benefits structure.

5. In the Fall of 1990, the active employee participants in the Plan were given the opportunity to elect either the contributory benefits structure or the non-contributory benefits structure of the Plan to become effective January 1, 1991. In fact, in 1990 approximately 2% of the employee participants participating in the contributory benefits structure elected to change to the non-contributory benefits structure. As of the beginning of 1991, approximately 66,000 Plan participants were accruing benefits under, receiving benefits under, or were terminated employees with vested benefits in, the contributory benefits structure.

I declare, under penalty of perjury under the laws of the state of California and the United States of America, that the foregoing is true and correct. This Declaration is executed on March 12, 1992, at Los Angeles, California.

/s/ Ann L. Verhey
ANN L. VERHEY

APPENDIX I

Watson Wyatt
Worldwide

Watson Wyatt & Company
Research and Information Center
Suite 800
6707 Democracy Boulevard
Bethesda, MD 20817-1129

Telephone 301 581 4600
Fax 301 581 4688

January 23, 1998

Mr. Kenneth W. Starr
Kirkland & Ellis
Suite 1200
655 Fifteenth Street, N.W.
Washington, DC 20005

Dear Mr. Starr:

We estimate that contributory defined benefit pension plans in the United States in which employees' contributions are at least $200 per year per active participant possess at least $60.7 billion in assets and cover at least 1.3 million workers and retirees. These estimates are probably somewhat understated. We obtained them by sorting a Form 5500 data file and identifying plans that showed that employees had made significant contributions. A copy of the data sort is attached.

As you know, I work with Watson Wyatt Worldwide, which is a global benefits consulting firm. Watson Wyatt obtained its pension plan data from the U.S. Department of Labor as a public use data file of 1994 Form 5500 filings. This file included only about 80% of all defined benefit pension plans with more than 100 participants, because approximately 20% of such plans had not yet been entered into the public use file when we purchased it.

Assuming that the plans for which we have data are representative of those for which we do not, we estimate that contributory defined benefit pension plans possess approximately $66.8 billion in assets and cover approximately 1.5 million American workers and retirees. We reached these estimates by inflating the number of participants and value of assets to reflect the undercount of plans. Before doing this, we subtracted the participants and assets of two large plans from the preliminary estimates above to avoid overstating the effect of the undercount. These two plans when combined had 565,000 participants and $37.4 billion in assets. The results were inflated to reflect to undercount of plans, and the participants and assets of the two large plans were added back to give the estimates above.

Sincerely,

/s/ Richard Joss

Richard Joss
Resource Actuary

RJ/jll

(2)

No. 97-1287

In The

Supreme Court of the United States

October Term, 1997

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

vs.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. McMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SETH KUPFERBERG
Counsel of Record
RICHARD DORN
I. PHILIP SIPSER
SIPSER, WEINSTOCK, HARPER & DORN, L.L.P.
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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit correctly followed *Lockheed Corp. v. Spink*, 116 S.Ct. 1783 (1996) by recognizing numerous material differences between this case and that one, including, among others, that this complaint alleges breach of ERISA's accrual, vesting and termination provisions and alleges a sham transaction contrived to conceal an illegal transfer of plan assets to a different plan.

2. Whether the Ninth Circuit correctly recognized, in harmony with precedent and the text of ERISA, that in addition to other significant differences between them, *Lockheed*, unlike this case, involved a purely employer-funded plan.

3. Whether the Ninth Circuit correctly recognized, in harmony with precedent, that participants in a contributory pension plan have rights expressly conferred by ERISA to assets derived from their own contributions.

4. Whether the Ninth Circuit correctly recognized, in harmony with precedent, that an employer, in appropriate circumstances, can be ordered to effect termination of a plan (including distribution of its assets) using the means specified in the termination provisions of ERISA.

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TABLE OF AUTHORITIES

Statutes and Regulations

Other

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This petition seeks review of the Ninth Circuit's refusal, on a § 12(b)(6) motion, to dismiss a complaint alleging that after employee contributions to a defined benefit pension plan enabled it to accumulate a $1.2 billion surplus, the employer closed the plan to new participants and substituted a different, noncontributory plan for new employees and current participants who elected to switch plans. By freezing participation in the contributory plan, Hughes limited the accrual of new benefits. As a result, surplus plan assets far exceed any possible future liabilities, so that surplus, left to itself, would simply continue to grow forever. The complaint alleges that this surplus, including the majority of the surplus which is derived from employee contributions, is being used by Hughes to meet its separate obligations under the new noncontributory plan.

The Ninth Circuit found that if the allegations are proven, the District Court has power to order termination of the contributory plan as a wasting trust. Termination would be effected under Title IV of ERISA, 29 U.S.C. § 1341 *et seq.*, whose § 1344 requires, among other things, that surplus derived from employee payments be "equitably distributed" to those who made them. The Ninth Circuit also found that diversion of plan assets derived from employee contributions to meet separate employer obligations to the new noncontributory plan may breach other provisions of ERISA, including its vesting, accrual, fiduciary and prohibited transaction rules; and that whether the old and new plans (which have different funding sources, benefits and beneficiaries) are indeed two plans or merely two "benefit structures" as Hughes prefers to call them, should be considered in the first instance by the District Court.

Review by this Court is unnecessary. Contrary to claims that the holding "flouted" *Lockheed Corp. v. Spink*, 116 S.Ct. 1783

(1996), "effected a revolution," and wreaked "havoc... across a vast expanse" of law (Pet. 1), the decision conflicts neither with *Lockheed* nor with any other holding of this Court or a Court of Appeals. It is carefully limited to unusual facts:

> "At the heart of this dispute is whether Hughes is entitled to use and control for its *own* benefit the Contributory Plan's one billion dollar surplus, approximately half of which was generated by employee contributions. This is *not* a case in which the pension plan at issue was funded entirely by employer contributions. Nor is this a case in which the employer used the plan's asset surplus *solely* to benefit participants of the plan.... plaintiffs allege that the employer used the Contributory Plan's asset surplus attributable in part to employee contributions for its own benefit and for the benefit of employees who were never participants in the Contributory Plan." App. 5a.

"No discovery was ever taken," App. 4a, and the facts are undeveloped. Even assuming *Lockheed* may one day need explication, this case, which does not turn on interpretation of *Lockheed*, does not conflict with any other reported decision, and calls for the development of an as-yet-absent factual record, is inappropriate to provide it. The petition should be denied.

STATEMENT OF THE CASE

Petitioners characterize this case as "about respondents' quest for a 'pot of gold.'" Pet. 1. They fail to mention that the pot was filled by employees, putting in a portion of their hard earned salaries. Respondents are participants in Hughes' contributory pension plan (the "Plan" or "Contributory Plan") which when Hughes froze participation and thus restricted accrual of benefits -- after four years in which *only* employees, *not* the employer, contributed (App. 3a, 136a) -- possessed a surplus ("assets [that] exceeded the actuarial or present value of accrued benefits") of $1.2 billion. App. 2a-3a, 137a.

Concerning the origins of this surplus, as on other points noted below, petitioners misstate what would be before this Court were certiorari granted. With *no* factual basis, petitioners assert that the Plan "invested its assets wisely, with excellent results" and that plaintiffs seek "to grab those investment returns for themselves." Pet. 2. There is *nothing* in the record about the Plan's investments. A developed record would likely show that the surplus came from: (1) return on Plan assets (derived from both employee and employer contributions) at rates any prudent investor would have realized, (2) employee contributions made after Hughes stopped contributing, and (3) forfeitures of benefits of non-vested participants when divisions and plants were closed or sold. What *is* in the record, is that "As of January 1, 1992, approximately half the surplus in the Contributory Plan was attributable to employee contributions." App. 3a.

Hughes sponsored the Plan for many years, making contributions to supplement those paid voluntarily by participating employees. In 1986 Hughes was sold to General Motors; Plan surplus was then almost $1 billion, while GM's own retirement plan was $7 billion underfunded. After the GM purchase, Hughes stopped making contributions to the Plan but continued to require participants to contribute. The surplus grew to $1.2 billion. App. 2a-3a, 137a. In 1991, Hughes froze the Plan and substituted the new Non-Contributory Plan which pays different, far lesser benefits.[1] No new participants could join the Plan. New employees, those not already in the Plan, and any who dropped out

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[1] According to petitioners, only "2% of the employee participants participating in the contributory benefits structure elected to change to the non-contributory benefits structure." App. 146a.

became participants in the new Non-Contributory Plan automatically.

In another misstatement of what would be before this Court were certiorari granted, petitioners call this an "amendment" that gave some participants in what remains a single plan a choice between two "benefit structures." Pet. 5. At another point, petitioners call it a "routine" amendment. Pet. 15. Plaintiffs allege, as discussed below, that the "amendment" was so far from "routine," that it effectively reduced the Plan to a wasting trust. As the Ninth Circuit summarized facts alleged,

> "Although created through an 'amendment' to the Contributory Plan, the Non-Contributory Plan shares virtually no characteristics with the older plan, other than administration by the same trustees." App. 3a-4a.

The Ninth Circuit found that to decide if separate plans exist requires a better developed record (App. 10a-12a, 16a-17a, 23a), and this finding is *not* among those on which petitioners have sought review. See "Questions Presented," Pet. i.

Respondents brought this action in 1992, alleging that Hughes' effective termination of the Plan, and use of surplus derived largely from employee payments to meet Hughes' separate obligations under the new Non-Contributory Plan, breached several clauses of ERISA. According to the complaint, freezing participation in the Plan and thus circumscribing accruals left it with assets "substantially in excess of those required to fund all current and future pensions" (App. 138a): assets which since the Plan continued to receive both employee contributions and investment income, were bound to increase still further. From its inception in 1991, the so-called "non-contributory benefit structure" -- really a separate plan -- was funded not by Hughes, but out of this surplus of the Contributory Plan. App. 4a. In short,

the Plan had been rendered a "wasting trust" whose corpus was of no use to its beneficiaries and which, plaintiffs argued, must be ordered terminated.

Under ERISA, any such termination would have to be effected in accordance with § 1344 which requires, among other things, that surplus derived from participant contributions be "equitably distributed" to those who made them. Hughes, the complaint alleged, failed to follow § 1344 (as well as the rest of Title IV of ERISA), and should be ordered to do so. Plaintiffs also claimed that Hughes' diversion of Plan surplus derived from participant contributions to meet separate employer obligations under the new Non-Contributory Plan breached other sections of ERISA: 29 U.S.C. §§ 1103 (plan assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants"), 1104 (plan fiduciaries must act "solely in the interest of the participants"), 1053 ("an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable"), and 1106 (prohibiting the transfer of plan assets to a party in interest). A sixth cause of action relates to Hughes' use of Plan surplus in 1989 to fund an early retirement incentive program. App. 139a-143a.

The district court dismissed the complaint, but the Ninth Circuit found that each cause of action states a claim on which relief may be granted, reversed, and remanded. As already stated, the court held that whether there are distinct contributory and non-contributory plans or just two "structures" of a single plan must first be addressed by the district court on developed facts, and this is not a question on which petitioners have sought review.[2]

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[2] In a footnote, petitioners do cite a regulation which defines a "plan" as "single" if all assets are available to pay all benefits, even if the "plan" has "distinct benefit structures which apply to the same or different participants." Pet. 20 n. 6, citing 26 C.F.R.§ 1.414(l)-(1),

(continued...)

The Ninth Circuit also held that when the Plan was frozen in 1991, it may have become a wasting trust under common law principles.

> "Only after discovery can the district court properly determine whether the Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan." App. 11a n. 3.

If this factual question is ultimately resolved in plaintiffs' favor the District Court could, under the Ninth Circuit's ruling, order Hughes to terminate the Contributory Plan pursuant to ERISA Title IV, including both equitable distribution of surplus derived from employee contributions as required by 29 U.S.C.§ 1344, and such other Title IV requirements as supervision by the Pension Benefit Guaranty Corporation.

In yet another misstatement of what would be before this Court were certiorari granted, petitioners characterize this as a decision on the question "whether Title IV of ERISA provides the exclusive means of terminating a defined-benefit plan," a holding that the Plan "could be terminated other than by" those means. Pet. 3 and 24; see also Pet. i and 21-5. Neither plaintiffs nor the Ninth Circuit ever suggested bypassing the means for termination set

[2](...continued)
reprinted at App. 128a. The regulation itself states it applies only "[f]or purposes of this section" dealing with the effect on plans' tax qualification of their merger, consolidation and transfer provisions. *Cf. PBGC v. Artra Group, Inc.*, 972 F.2d 771 (7th Cir. 1992), discussing tax qualification of single- and multiple-employer plans.

forth in Title IV.[3] Plaintiffs' request is precisely that Hughes be ordered to use those means.

Similarly, contrary to the claim that the decision "flouted" *Lockheed*, the Ninth Circuit carefully considered that as well as other decisions by this and lower courts. *Lockheed*, the Ninth Circuit explained, held that amendment of a noncontributory pension plan to increase some participants' benefits could not violate ERISA -- provided no ERISA clauses other than 29 U.S.C. § 1104 were violated -- because the employer amended the plan as sponsor, not as a fiduciary. App. 7a-8a.

The complaint in this case, however, alleges breach of accrual, vesting and termination provisions of ERISA, not just the fiduciary duty provision in § 1104. *Lockheed*, as the Ninth Circuit pointed out, "specifically noted that 'there is no claim in this case that the amendments resulted in any violation of'" ERISA's structural requirements. App. 21a n. 8 and 24a, quoting 116 S.Ct. at 1790 n. 5.

The complaint, moreover, alleges that what petitioners call an "amendment" was really a sham transaction that closed the Plan in order to transfer its assets to the new non-contributory plan which had different participants. *Lockheed*, as the Ninth Circuit also pointed out, expressly recognized that "a sham transaction, meant to disguise an otherwise unlawful transfer..., might present a different question from the one before us." App. 24a, quoting 116 S.Ct. at 1792 n. 8. For both these reasons as well as others stated by the Ninth Circuit (App. 7a-8a, 10a, 12a n. 4, 14a, 17a, 21a n. 8, 24a, 25a), *Lockheed* was quite different from this case.

[3] To minimize the possibility of such misreading, the Ninth Circuit amended its opinion after Hughes filed a motion for rehearing, deleting certain references to when a termination occurs. App. 11a, 22a-23a, 49a-50a.

Petitioners' characterization of what would be before this Court were certiorari granted is especially misleading because the petition discusses only one of the several distinctions drawn by the Ninth Circuit between this case's facts and those in *Lockheed*. The Ninth Circuit noted as *one* significant difference between this case and *Lockheed* that Hughes' Plan, unlike the noncontributory plan in *Lockheed*, was largely employee-funded. But as summarized above, the Ninth Circuit also stressed that plaintiffs here, unlike in *Lockheed*, allege both structural violations of ERISA's accrual, vesting and termination provisions, and a sham "amendment" that really involved the transfer of Plan assets to a different plan. E.g., App. 7a-8a, 17a-18a, 21a n. 8, and 24a. The petition (wrongly) minimizes the significance of the first distinction. It completely ignores all the others. Pet. 10-20.

While sustaining the validity in the face of a motion to dismiss of each of plaintiffs' claims, the Ninth Circuit made clear that it was neither making factual findings (e.g., App. 11a n. 3, 21a n. 6) nor even deciding exactly how much plaintiffs must prove to establish each cause of action:

> "The simple question before us is whether plaintiffs have alleged sufficient facts in their complaint to state *any* claim for relief under ERISA." App. 2a.

Petitioners filed a suggestion for rehearing en banc. Not a single judge of the entire Ninth Circuit, not even Judge Norris who had dissented from the panel's decision, requested a vote on the suggestion. App. 50a.

One more distortion in the Petition, discussed in more detail below (pp. 29-30), should be identified. A claim that review is appropriate because contributory defined benefit plans "cover more than 1 million American workers and retirees, and hold more than $60 billion in assets" (Pet. 16) is not based on the record, is not germane to the legal issues, and also, although purporting to show

that this case has widespread significance, actually underlines the highly unusual nature of the facts alleged in the complaint. There is no reason to think such facts are common or can be commonly alleged.

That the Petition includes so many misstatements reflects the lack of any actual reason to grant the writ. This case has great importance to Hughes, which wants to keep using the Plan's "pot of gold" (by now, filled even higher than in 1991) to pay Hughes' separate obligations to the new Non-Contributory Plan.[4] The holding below simply affirms that ERISA cannot be ignored. That may limit Hughes' access to Plan surplus or irk employers that would prefer complete freedom of action, but it hardly calls for Supreme Court review.

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[4] Forms 5500 filed by Hughes confirm that it has continued not to contribute to either plan, instead using Plan surplus to meet employer obligations. The most recent Form 5500 (for the year ending November 30, 1996 and covering both "benefit structures" on a consolidated basis) shows the Hughes Non-Bargaining Retirement Plan with $5.5 billion in net assets and $4.0 billion in projected liabilities (including those under the new non-contributory plan), confirming plaintiffs' prediction that Plan surplus will continue to grow.

The "pot of gold" image used by petitioners is telling. Hughes' amassing of the money it now claims indeed recalls the folklore of leprechauns: "In the night time we go about the country into people's houses and we clip little pieces off their money, and so, bit by bit, we get a crock of gold together." James Stephens, *The Crock of Gold*, ch. 8 (1912). But while leprechauns were little people saving a ransom for use if captured, Hughes just wants to pay its bills with the Plan's money.

REASONS FOR DENYING THE WRIT

In terms of the considerations governing certiorari stated in this Court's Rules, the Petition purports to offer two arguments. First, it claims that the decision below conflicts with this Court's ruling in *Lockheed*. See the first "Question Presented," Pet. i, and Pet. 10-13. It also claims the decision conflicts with other Circuits on any of three issues: the reach of *Lockheed* (second "Question Presented and Pet. 14-5), the existence of employee interest in plan assets derived from employee contributions (third "Question Presented" and Pet. 16-20), or the means required for termination of ERISA plans (fourth "Question Presented" and Pet. 21-5). Finally, the petition claims the decision will have "staggering" or "extraordinary" impact. Pet. 15-6. None of these contentions withstands scrutiny.

I. The Ninth Circuit did not "refuse to follow" *Lockheed* nor does the decision below conflict with *Lockheed*.

Petitioners claim the Ninth Circuit "flouted" or "refused to follow" *Lockheed*. Pet. 1, 10-13. They summarize *Lockheed* as holding that amendment of any type of pension plan, contributory or not, does not involve a fiduciary duty. As shown below (pp. 14-18), such a characterization of *Lockheed*'s holding is too sweeping. But more fundamentally, even if it were correct, the Ninth Circuit's decision still would not conflict with *Lockheed* since the Ninth Circuit recognized numerous differences between this case and *Lockheed*, mentioning the Plan's contributory nature as just one. Petitioners simply ignore most distinctions recognized by the decision below between *Lockheed* and this case.

A. This is not just a fiduciary duty case, but alleges breach of ERISA's structural requirements.

Contrary to the petition's presentation, this is not just a fiduciary duty case alleging violation of 29 U.S.C. § 1104 (or even

one alleging a prohibited transaction under § 1106). The complaint alleges, as the Ninth Circuit summarized it, that when "amending" the Plan Hughes "violated ERISA's vesting, nonforfeiture, and distribution requirements under 29 U.S.C. §§ 1053(a) and 1344." App. 8a.

Lockheed endorsed cases like *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) which say that fiduciary functions do not, in general, include plan design. 116 S.Ct. at 1789 and n. 4. But *Lockheed* also expressly recognized that parts of ERISA other than its fiduciary provisions do govern plan amendments. 116 S.Ct. at 1790: "While other portions of ERISA govern plan amendments,... the act of amending a pension plan does not trigger ERISA's fiduciary provisions."

As the Ninth Circuit pointed out, *Lockheed* "specifically noted that 'there is no claim in this case that the amendments resulted in any violation of'" such structural ERISA requirements. App. 21a n. 8 and 24a, quoting 116 S.Ct. at 1790 n. 5. That an employer in designing a plan is free, regardless of motivation, to choose any structure which ERISA permits, does not mean it is also free to choose a prohibited structure. Similarly this Court in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 1075-8 (1996), held that 29 U.S.C. § 1132(a)(2) allowing suits for breach of the fiduciary duties imposed by ERISA is supplemented by § 1132(a)(3), "a safety net, offering appropriate equitable relief for" other ERISA violations.

That *Lockheed* does not require dismissal of this complaint is obvious. Plaintiffs do allege breach of clauses of ERISA other than § 1104 and § 1106: § 1103's bar on inurement of plan assets to the employer's benefit (which as the Ninth Circuit said, App. 8a, has never been held to be "only triggered when an employer is acting as a fiduciary"), § 1053's bar on forfeiture of "an employee's rights in his accrued benefit derived from his own contributions," and § 1344's requirements for plan terminations. *Lockheed* held

the payment of benefits "to plan participants and beneficiaries pursuant to the terms of an otherwise lawful plan" to be beyond the scope of § 1106's ban on transactions with a party in interest. 116 S.Ct. at 1790. There was no claim that the amendments at issue in *Lockheed* rendered the plan *not* "otherwise lawful" by causing "any violation of the participation, funding, or vesting requirements of ERISA." *Id.* n. 5.

Those sections, at issue here, apply regardless whether the employer acts as sponsor or fiduciary. Accordingly, *Lockheed* plainly does not foreclose this case.

B. This is not just an amendment case, as the so-called "amendment" at issue was allegedly a sham.

Lockheed, as the Ninth Circuit also said, also expressly recognized that "a sham transaction, meant to disguise an otherwise unlawful transfer..., might present a different question from the one before us." App. 24a, quoting 116 S.Ct. at 1792 n. 8. For this reason too, petitioners' argument -- that *Lockheed* holds that an empoyer's motive for amending a plan does not matter -- is beside the point.

The Ninth Circuit correctly found, in a holding which petitioners have not asked this Court to review, that to decide if what happened here was indeed the amendment of a continuing plan as petitioners claim -- or the closing of the Plan, creation of another, and diversion to it of Plan assets for Hughes' benefit as plaintiffs allege -- requires a developed record. If that question is ultimately resolved in plaintiffs' favor, the employer's use of one plan's assets to fund another plan will clearly be both a prohibited transaction under § 1106 and a § 1104 breach of fiduciary duty.[5]

[5] *See, e.g., Donovan v. Mazzola*, 715 F.2d 1226, 1231, 1237-8 (9th (continued...)

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152 (1993), held that an employer's transfer to a defined benefit pension plan even of unencumbered, fairly valued property breached the Tax Code's prohibited transaction clause, a companion to 29 U.S.C. § 1106. The clauses, the Court explained, bar any "transfer of property in satisfaction of a debt," closing what before ERISA was "an open door for abuses such as... the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid." *Id.* at 159-60. The uncompensated transfer of Plan assets to meet Hughes' non-plan obligations, if proven, will be a more egregious prohibited transaction.

It will breach § 1104 as well. The allegedly unlawful diversion of Plan assets required cooperation from Plan fiduciaries, such as the administrator which used Plan assets to pay benefits under the new noncontributory plan, and could not have been implemented by Hughes acting solely as settlor. *Lockheed* distinguishes settlor and fiduciary acts. It does not authorize schemes to divert assets from a plan. For this reason too, there is no conflict between the holding below and *Lockheed*.

[5](...continued)
Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), which found a "per se prohibition against a loan between two funds where the trustees are identical but the participants and beneficiaries are not" -- a situation quite similar to that here, in which Hughes is using Plan assets to fund another plan. (As discussed earlier, Hughes' claim that there are two "structures" of a single plan was remanded to the District Court, in a finding on which the petition does not seek review.) *Mazzola* also noted that ERISA makes the common law of trusts even "more exacting." Labeling an improper decision an "amendment" does not always insulate it from fiduciary review. See, *e.g.*, *Heath v. Varity Corp.*, 71 F.3d 256, 259 (7th Cir. 1995) (doubting that a plan could be amended to exclude an employee by name).

C. Noticing that *Lockheed* dealt with a noncontributory plan is not "refusal to follow controlling authority."

In addition to pointing out, as already discussed, that the complaint here makes allegations completely different from those in *Lockheed* and expressly distinguished in the *Lockheed* opinion, the Ninth Circuit also pointed out that *Lockheed*, unlike this case, involved a purely employer-funded plan. Petitioners (while totally ignoring other points which are themselves dispositive) describe the recognition of difference between contributory and noncontributory plans as "refusal to follow" *Lockheed*. They also describe the "ostensible distinction between contributory and non-contributory plans" as "meaningless." Pet. 13.

1. The logic of *Lockheed* permits distinctions between contributory and noncontributory plans.

While petitioners argue that *Lockheed* did not "even mention whether the plan was contributory" (Pet. 12-13), its reasoning nonetheless makes the plan's nature relevant. Especially in a case alleging diversion of Plan assets to non-participants in the Plan, there is an obvious distinction between an employer-funded pension plan like the one *Lockheed* found could be amended without reference to fiduciary duties, and one largely funded by the employees themselves.

Lockheed explains its conclusion (quoted by petitioners) that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions" as follows. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228 (1995), had already found employers "generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans," and *Lockheed* found "no reason why the rule of *Curtiss-Wright* should not be extended to pension benefit plans." It pointed out that 29 U.S.C. § 1002(21)(A), defining fiduciary status in terms of discretion

"respecting management of such plan or... any authority or control respecting management or disposition of its assets," does not distinguish welfare from pension plans, and that most lower courts had found that the fiduciary functions listed in § 1002(21)(A) "do not include plan design." As *Lockheed* summarized *Curtiss-Wright*, when employers "'adopt, modify or terminate welfare plans'..., they do not act as fiduciaries... but are analogous to the settlors of a trust." 116 S.Ct. at 1789-90.[6]

While one definition of "fiduciary" thus applies to welfare and pension plans, and the mere "act of amending a pension plan" does not in and of itself "trigger ERISA's fiduciary provisions," this hardly means there can be no relevant difference between contributory and noncontributory pension plans. The opposite is true. The basis stated in *Curtiss-Wright* for holding employers can generally amend welfare plans for any reason was that ERISA, as the Court put it, "does not create any substantive entitlement to" welfare benefits. 115 S.Ct. at 1228. Welfare plans are also virtually always pay-as-you-go, without the pre-funding that characterizes pension plans. As *Curtiss-Wright* said, ERISA does not mandate "participation, vesting, or funding requirements for welfare plans as it does for pension plans." *Id.*

The prospective amendment of a welfare plan, even one that is contributory, can therefore almost never be said to breach the employer's statutory obligations, to "dispose of" current plan assets, or to deprive employees of a benefit they funded themselves. In these respects relevant to deciding whether amending a plan implicates fiduciary duties, contributory and non-contributory welfare plans are hardly different; they are also

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[6] *Varity Corp. v. Howe*, 116 S.Ct. 1065, 1070, 1073-4 (1996), recently reaffirmed that ERISA has its "starting point" in "ordinary trust law." *Cf. Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) ("ERISA abounds with the language and terminology of trust law.").

comparable, as discussed below, to non-contributory pension plans like the one to which *Lockheed* extends "the rule of *Curtiss-Wright*." 116 S.Ct. at 1789. Things are quite different for a contributory pension plan.[7]

To the extent that ERISA does *not* leave employers free to design plans however they wish, "the rule of *Curtiss-Wright*" does not require freedom from fiduciary scrutiny. To repeat a point made earlier, that an employer designing a plan is free, regardless of motivation, to choose a structure which ERISA permits, does not mean it is also free to choose what the statute specifically prohibits.

ERISA, as *Curtiss-Wright* said in explaining its holding, does not mandate "participation, vesting, or funding requirements for welfare plans." The statute has such requirements for pension plans, but the amendment which *Lockheed* found permissible regardless of the employer's motives was not alleged to contravene them. 29 U.S.C. § 1053, however, makes nonforfeitable an employee's "accrued benefit derived from his own contributions," a vesting requirement for contributory pension plans which has no counterpart for noncontributory plans (or any welfare plan). Hughes' actions here allegedly contravened that section.

Curtiss-Wright and *Lockheed* found plan design a matter free from fiduciary standards because ERISA places no limits on employer choice. To the extent an amendment impairs vesting rights which ERISA, as a substantive matter, requires -- as was allegedly true here -- that employers "generally" can design what they like is beside the point.

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[7] For this reason, claims that the holding below will unsettle the law of "health plans, disability plans, and a wide range of other welfare plans" and "could [not] be limited to contributory defined-benefit pension plans" (Pet. 15-6) are insubstantial.

The same point can be made another way. That one definition of "fiduciary" governs all benefit plans, as *Lockheed* held, does not imply that specific facts to which the definition applies are to be ignored. As this Court recognized in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), the words of § 1002(21)(A) "are not self-defining." Some circumstances fall "clearly neither within nor outside of the common understanding of" the words, and in those circumstances, courts "look to the common law." *Id.* at 1073.

Amending a contributory pension plan (unlike either a noncontributory plan or a welfare plan, even a contributory one that operates pay-as-you-go) may well "dispose of" current plan assets that derived from employee contributions.[8] Moreover the participants in such a plan, no less than the employer, are "analogous to the settlors of a trust." *Lockheed*, 116 S.Ct. at 1790.

As the Ninth Circuit put it, when a plan is funded by both the employer and employees they are essentially "*co*-settlors of the plan." App. 14a. Such a description conforms to settled trust law. "A person who furnishes the consideration for the creation of a trust is the settlor, even though in form the trust is created by

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[8] Petitioners criticize the Ninth Circuit's comment, App. 16a, that "Hughes was disposing of the plan's assets when it amended the plan," asserting, though not really arguing, that this is refuted by *Lockheed* and *Siskind v. Sperry Retirement Program*, 47 F.3d 498 (2d Cir. 1995). Pet. 12 n. 1. Petitioners completely ignore the crux of the comment, namely that Hughes, while ostensibly "amending" the Plan, allegedly actually disposed of its assets by closing it and making it a wasting trust. Even setting this aside, however, the discussion here shows that *Lockheed* and *Sperry* do *not* refute the idea that amending a contributory pension plan can "dispose of" its assets within the meaning of § 1002(21)(A).

another person." *Scott on Trusts* § 156.3 at 180 (4th ed. 1987).[9] *Cf. Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1239 (9th Cir.), *cert. denied*, 498 U.S. 889 (1990) (employer was not the settlor of a disability fund or entitled to its surplus assets, where employees paid the premiums); *Mine Workers v. Boyle*, 418 F.Supp. 406, 409 (D.D.C. 1976), *aff'd*, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 956 (1978) (employer rather than beneficiaries was the settlor of a fund since "From its inception, the Pension Trust has been non-contributory and a gratuity by the UMWA to its former employees"). *Lockheed*'s finding that an employer which is analogous to a traditional trust's settlor may alter the plan without reference to fiduciary standards does not dispose of cases in which employees, as well as the employer, resemble traditional trust law's settlors.

Lockheed, as mentioned earlier, cites *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995), for the rule that fiduciary functions do not, in general, include plan design. 116 S.Ct. at 1789 and n. 4. *Sperry* itself shows that the general rule is not universal. Contrasting a single-employer plan "funded entirely by Sperry," *Sperry* expressly recognized that courts "have treated plan amendments as fiduciary functions" when faced with multiemployer plans with employee as well as employer trustees. 47 F.3d at 505-6. The Plan here, with assets largely derived from employee contributions, resembles such plans more than it does the one found subject to employer amendment in *Lockheed*. That that case did not discuss facts not before the Court, hardly shows such facts never make a difference.

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[9] Compare *Bogert on Trusts & Trustees* § 41 at 128 (2d ed. 1984): "One who furnishes the consideration necessary to induce another to create a trust is the settlor of the trust when it is created."

2. The distinction between contributory and noncontributory plans, which petitioners call "meaningless," is statutory.

Petitioners, quoting Judge Norris in dissent, call the distinction between contributory and non-contributory plans which the Ninth Circuit recognized "meaningless" because

> "The only practical difference between the two types of plans is whether the employer funds them *directly*, through contributions to the plan, or *indirectly*, through wages paid to employees that the employees then contribute. 'In terms of economic reality,... [e]ither way, the contributions are the economic product of the employee's services.'" Pet. 13.

That both employer and employee contributions spring from employee services better supports enhanced employee rights to *all* Plan assets, than unlimited employer rights. In any event both common sense and ERISA recognize a difference between employer payments to a plan, and money earned by employees as wages which they then choose to contribute.

Petitioners' refusal to see this demonstrates both faulty reasoning and arrogance. Employees who voluntarily contribute to a plan do so *with their own money*. That this comes from wages no more makes it Hughes' money, than the fact that workers pay a home mortgage out of wages means that Hughes bought them the house. What is decisive, in any event, is that ERISA, as even the dissent below concedes (App. 37a), distinguishes employee from employer contributions to plans: for example, in 29 U.S.C.§§ 1344 and 1053. As the Ninth Circuit said, these provisions make clear

> "that Congress intended to distinguish... plan assets attributable solely to employer contributions from

plan assets attributable in part to employee contributions." App. 9a.

These provisions which treat employee and employer contributions differently -- regardless what might be said about "economic reality" -- are consistent with the normal equitable practice which as discussed above, treats those who supply the consideration for a trust as its settlors. As the Ninth Circuit put it, when a plan is funded by both the employer and employees, they are essentially *co*-settlors. App. 14a. This Court recently reaffirmed in *Varity* (see note 6 above) that such common-law principles are often the starting point when interpreting ERISA -- even in the absence of specific ERISA clauses such as those already cited. In recognizing the possibility of distinction between employee and employer contributions, the Ninth Circuit properly followed not its own view of "economic reality," but that of both settled trust law, and Congress when it enacted ERISA.

II. There is no conflict between the Ninth Circuit's ruling and those of other Circuits.

Petitioners also claim the holding below conflicts with those of other Circuits, on three issues: the reach of *Lockheed*, the existence of an employee interest in employee contributions, and the means necessary to terminate an ERISA plan..

A. There is no conflict with other Circuits about the reach of *Lockheed*.

The petition claims that even if *Lockheed* "could be limited to non-contributory plans, the decision below would still merit review" because it conflicts with those of other Circuits on this issue. Pet. 14-5. As already discussed, limitation to non-contributory plans was far from the only reason given by the Ninth Circuit for concluding that *Lockheed* does not dispose of this complaint. The cases from other Circuits cited by petitioners, like

Lockheed itself, did not involve alleged violations of ERISA's structural requirements, or claims that so-called "amendments" were really sham transactions contrived to divert plan assets to another plan.

Even setting that aside, there is plainly no conflict with other Circuits about the reach of *Lockheed*, which none of the pre-*Lockheed* decisions cited by petitioners even discusses. The decisions cited found on the facts of those cases that amendments to contributory pension plans were settlor acts and not fiduciary violations. They did not construe *Lockheed*, nor do they conflict with the Ninth Circuit's holding in any other respect.

The Ninth Circuit specifically distinguished one such case, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994), in which the employer

> "chose to give an extra benefit to one group of employees within a larger group.... There was *no* allegation... that the employer transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants." App. 17a.

Similar distinctions might be drawn with respect to each of the other pre-*Lockheed* cases cited in the petition.

Other courts besides the Ninth Circuit have applied fiduciary standards both to amendment of trusteed employee-employer plans (as discussed in *Sperry*, *supra*), and to the allocation of assets between old and newly created plans. *E.g.*, *John Blair Communications, Inc. Profit Sharing Plan v. Telemundo*

Group, Inc. Profit Sharing Plan, 26 F.3d 360, 368-70 (2d Cir. 1994).[10]

More fundamentally, even assuming this Court might some day need to clarify whether under *Lockheed*, amendment of a contributory pension plan can implicate fiduciary duties, there is surely no occasion to do so here. Lower courts have not addressed the question in light of *Lockheed*, nor has any conflict about *Lockheed*'s interpretation arisen. In light of other issues raised by the complaint and not yet factually developed, the question, however construed, would not decide this case. Whatever questions *Lockheed* may have left to future cases, it is hard to imagine one less appropriate than this one to resolve them.

B. There is no conflict with other Circuits about employees' interest in their own contributions.

The petition claims that the decision below conflicts with those of other Circuits by resting on an "erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan." Pet. 16-20. The cases cited to support the claim, beginning with *Georgia-Pacific*, and the Ninth Circuit's discussion and distinction of these cases, have both been described in the preceding section.

Moreover, 29 U.S.C. § 1344, as the Ninth Circuit recognized (App. 22a) provides expressly that upon a plan termination, surplus plan assets may not revert to an employer unless the plan so provides (which the complaint here alleges is not the case) and more important, that even if there is a reversion provision, surplus assets attributable to employee contributions

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[10] While *John Blair* involved defined-contribution plans, ERISA, as discussed above, vests employee interests in their own contributions even for defined-benefit plans.

must be "equitably distributed" to the employees who made them. In the complaint here, unlike cases cited in the petition, Hughes' alleged attempt to bypass this requirement is at issue.

The erroneous premise underlying petitioners' argument -- that there is no difference under ERISA between employee and employer contributions -- has already been discussed as well. The Ninth Circuit correctly rejected arguments that as long as employees receive what was promised them under a defined benefit pension plan, they have no possible complaint.

Petitioners implicitly liken Hughes to an insurer, and Judge Norris in dissent argued that plan sponsors which face the risks of "bad times (when declines in the value of assets make plans underfunded)" should in good times "benefit from surpluses." Pet. 17, App. 29a. As the decision below recognized, however, ***ERISA plans are not insurance policies*** but funds held in trust (29 U.S.C. §1104) under strict regulation for the exclusive benefit of participants (§1103). *Cf. Clothing & Textile Workers v. Murdock*, 861 F.2d 1406, 1409, 1417 (9th Cir. 1988) (authorizing a constructive trust over surplus plan assets which an employer sought to recoup for itself, even though no one was actually hurt by a breach of fiduciary duty and all participants "received their actuarially authorized benefits").

29 U.S.C. §1053 expressly states that "an employee's rights in his accrued benefits derived from his own contributions are non-forfeitable," requiring that participants always be 100 per cent vested in their own contributions. Petitioners acknowledge in a footnote that under §§ 1053 and 1054 employees, "regardless of the level of defined benefits,... have a 'vested right' to receive benefits equal to their mandatory contributions plus an imputed rate of interest." Pet. 18 n. 4. In other words, participant interest in plan assets *can* exceed the benefits promised by a defined-benefit plan, if assets derived solely from employee contributions

exceed those benefits. As the Ninth Circuit recognized (App. 19a), that is what is claimed here.

Other courts besides the Ninth Circuit have recognized the obvious point that under ERISA, employees have interests in assets derived from their own contributions. Indeed even before § 1344 codified employees' equitable right to a share of surplus on plan termination, the right was recognized by the D.C. Circuit, and the argument advanced for petitioners, that employers which bear investment risk should reap its profit, was rejected. *Bridgestone/Firestone, Inc. v. PBGC*, 892 F.2d 105, 111 (D.C.Cir. 1989). *Cf. Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1238 (9th Cir.), *cert. denied*, 498 U.S. 889 (1990); and *Borst v. Chevron Corp.*, 36 F.3d 1308, 1315 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), explaining that

> "so far as concerns surplus assets,... ERISA ... markedly distinguishes between those attributable to employee contributions and those attributable to employer contributions."[11]

[11] *See also Chait v. Bernstein*, 835 F.2d 1017 (3d Cir. 1987). That case stressed that the plan whose surplus assets were being allowed to revert to the employer was wholly employer-funded, and contrasted *Delgrosso v. Spang and Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986), in which the employer was *not* allowed to amend its plan. This employer, on realizing that a defined contribution plan was well funded, had changed it to a defined benefit plan, paying

> "no new sums into the fund after the conversion.... Obviously, the employer under these circumstances did not present a sympathetic case for reversion of surplus." *Chait*, 835 F.2d at 1025.

While the technical basis for *Spang*'s ruling was that employer (continued...)

To vary an analogy already used, that Hughes sponsored the Plan to which employees voluntarily contributed no more entitles Hughes to their money, than sponsorship of a Christmas club through which employees saved would entitle Hughes to funds not spent at the year's end. 29 U.S.C. §1144 expressly states that "neither an employee benefit plan... nor any trust established under such a plan shall be deemed to be an insurance company." The notion that plan assets derived from employee contributions, like an insurance company's holdings, belong to the employer as settlor and can be invested for employer profit as long as promised annuities are paid is fundamentally mistaken.

C. There is no conflict with other Circuits about the means for terminating an ERISA plan.

Petitioners' claim that the Ninth Circuit's holding conflicts with cases ruling that an ERISA plan may only be terminated pursuant to Title IV is another red herring. Pet. 21-5. Neither plaintiffs nor the Ninth Circuit ever suggested terminating the Plan through other means. Petitioners cite three cases holding what no one denies: that a plan can only terminate through Title IV. Pet. 22-3. At least two of the three also show that just as the Ninth Circuit held, a reluctant employer, in appropriate circumstances, can be ordered to use those means.

Thus *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), rejected a claim that an employer which sought to terminate a plan, but learned it was underfunded and could not be terminated pursuant to Title IV

[11](...continued)
payments, when made, were to a defined contribution plan, the action challenged -- manipulation of a defined-benefit plan to divert its surplus to the employer -- resembled Hughes' action here. *Chait* clearly considered this important. It stressed "the equities and underlying policy questions presented by the facts." 835 F.2d at 1026.

without an additional employer contribution, was obligated by statute to proceed with the termination. The decision, however, *reversed* the dismissal of a claim that the employer had obligated itself contractually to terminate the plan. *Id.* at 580-1. In finding "a material issue of fact... concerning the parties' intent to impose on the Company a duty to provide the funding needed to secure IRS approval of termination," the court necessarily held that if this issue was resolved in plaintiffs' favor, the employer *could* be ordered to terminate the plan under Title IV despite its reluctance to do so.

Phillips v. Bebber, 914 F.2d 31, 34 (4th Cir. 1990), actually *ordered* plans to be "terminated in conformity with the procedures set forth in ERISA" -- the same result which is sought by plaintiffs here. That the Plan here was not terminated in conformity with Title IV -- and must be, since Hughes has frozen enrollment with a surplus so big the Plan is a wasting trust -- is the point of the complaint.

The third case cited by petitioners, *Matter of Esco Manufacturing Co.*, 50 F.3d 315 (5th Cir. 1995), held that a bankruptcy trustee replaced a plan's sponsor rather than its administrator (an employer-union committee). Thus ERISA's Title IV, which governs administrators, did not apply to the trustee. This issue, the only one discussed in *Esco*, has no possible relevance. Hughes is both the Plan's administrator and its sponsor. Par. 6 of the Complaint, App. 133a.[12]

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[12]Withdrawn opinions in *Esco*, 33 F.3d 509 (5th Cir. 1994), make its factual setting clearer and as in the case of other decisions cited by petitioners, make obvious that an employer *can*, in appropriate circumstances, be ordered to terminate a plan. The original majority and dissent agreed, *Id.* at 515 and 518, that "Someone must shoulder the responsibility for terminating the pension plan," in other words, that plans can be terminated regardless of the employer's wish. The (continued...)

The obvious point of requiring that employees who contributed to a plan get an equitable share of surplus on termination is to limit employers' ability to take for themselves the assets of such plans. If an employer could evade it simply by calling what amounts to a termination an "amendment" and not giving formal notice, § 1344 would have no meaning.

In a case not mentioned by petitioners, *In re Gulf Pension Litigation*, 764 F.Supp. 1149 (S.D.Tex. 1991), *aff'd in part sub nom., Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 1699 (1995), the district court (in a holding not appealed) reached the same conclusion as the Ninth Circuit here, that a plan which had been converted to a wasting trust must be terminated, and accordingly ordered the defendant "to submit termination papers to PBGC." 764 F.Supp. at 1204-5, 1216. The same should be true of a judgment here (just as it was in *Phillips, supra*), and nothing in the Ninth Circuit's decision suggests otherwise.[13]

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[12](...continued)
dissent, *Id.* at 518, called it unnecessary to make the trustee act and create a conflict with bankruptcy law since "ERISA provides an alternative," a PBGC-initiated termination under 29 U.S.C. § 1342. For the overfunded Plan here, as in the *Gulf* case discussed below, this alternative does not exist.

[13] Petitioners have stressed that the PBGC must supervise any termination, a proposition that while true, has nothing to do with the validity of a complaint asking that Hughes be ordered to terminate the Plan. The *Gulf* Complaint, like the one here, alleged that plans "should be terminated" and surplus distributed, without mentioning the PBGC. 764 F.Supp. at 1201. *Gulf* first found the plans wasting trusts that should have been terminated and ruled there was equitable power to order them spun off "according to the terms of the Final Judgment" from a plan into which they had been merged. *Id.* at 1204-5. Only in (continued...)

The complaint's and decision's theory that pension plans, like other trusts, terminate once their purposes are accomplished was accepted in *Gulf* (764 F.Supp. at 1201-4),[14] and the petition cites no case in which the theory was rejected. Despite an effort by Judge Norris in dissent to distinguish them (App. 42a-44a), the facts on which *Gulf* found "wasting trusts that should have been terminated" -- that the employer closed participation in trusts "substantially overfunded as to all future liabilities" (*Id.* at 1204) -- are just like those alleged here. Par. 29 of the Complaint, App. 138a.

Petitioners (not the complaint, whose allegations should be accepted on a motion to dismiss) claim that even after the Plan was frozen in 1991, "66,000 Hughes employees... continued to accrue or receive benefits under the original contributory benefit structure." Pet. 5. How many employees continued to ***receive*** benefits is irrelevant to the Plan's having been frozen and a cap placed on the accrual of ***new*** benefits. That employees who could not be joined by new participants continued to accrue benefits does not distinguish *Gulf*, where the wasting trusts still had 2900 working participants with projected benefits from future service of $4 million, "***de minimis*** in relation to the surplus." 764 F.Supp. at 1203. Of course, such factual issues as exact figures for working participants and projected future benefits, or how many millions of dollars are ***de minimis*** in relation to a surplus, can neither be

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[13](...continued)
that judgment, *Id.* at 1216, was Chevron ordered to take "ministerial steps" including notice to the PBGC. It is Hughes, not plaintiffs, that seeks to bypass the PBGC by not proceeding with a formal termination.

[14] *Cf. Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F.Supp. 359, 372 (N.D.Ga. 1986) (ordering termination of defined contribution plan to prevent benefits from "end[ing] up in legal limbo forever").

decided on a motion to dismiss, nor serve as a basis for granting certiorari. The Ninth Circuit did not decide such factual questions, which are as yet undeveloped. App. 11a n. 3, 21a n. 6.

The relevant legal point is simple. If plan termination depended solely on an employer's choice of word -- in effect, the argument made by petitioners, without support in any reported case, and flatly contradicted by the ***Beaumont Glass*** decision on which they rely -- Title IV's safeguards would be shorn of meaning.

III. Contrary to the petition's claim that the decision below will have "staggering" consequences, the fact pattern alleged, which the Ninth Circuit held may be developed in discovery, is highly unusual.

The petition contends that the decision below "would adversely affect all kinds of employee-benefit plans" and have "staggering" consequences. Pet. 15. Apart from specious claims that the challenged employer decision was "routine," or that it might be impossible to distinguish contributory pension plans from welfare plans (see note 7 above), the contention is based entirely on a non-record estimate that contributory defined-benefit pension plans "cover more than 1 million American workers and retirees, and hold more than $60 billion in assets." Pet. 15-6.

The estimate, assertedly based on 1994 data, comes from a letter from "a global benefits consulting firm" to petitioners' lawyer. It is not part of the record. It says nothing about the amounts contributed by employees as compared with employers, which for most of the plans supplying data (since the letter defines as "significant" employee contributions of as little as $200 per year) were surely far smaller than is true of the Plan here. App. 149a-150a. Even setting both these problems aside, the letter's estimate of plan "assets" -- not ***surplus*** assets like those in this case -- underlines how atypical the Hughes Plan is.

According to the complaint, Hughes' Plan, when frozen, had $1.2 billion, half derived from employee payments, in surplus assets alone. App. 4a-5a, 137a. That is, it had $600 million in *surplus* assets ***derived from employee contributions*** alone! While no comparison with other plans is in the record (or relevant to the legal issues), petitioners' attempted reliance on a completely extraneous non-record estimate of plan ***assets*** (including those needed for accrued benefits, and those derived from employer contributions) shows the emptiness of their claim that review by this Court is appropriate. While it may be true that "[c]ontributory plans are common" (Pet. 15), plans like the Hughes Plan are not.

CONCLUSION

For these reasons, as well as others apparent from the decision below, the writ of certiorari should be denied.

Respectfully submitted,

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No. 97-1287

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF AUTHORITIES

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REPLY TO BRIEF IN OPPOSITION

1. Notwithstanding respondents' efforts to conjure up factual and legal complexity, this case hinges on a straightforward question: do participants in a defined-benefit plan have any pre-termination right to plan assets in excess of their defined benefits? The answer to that question is plainly no. Respondents, as participants in a defined-benefit plan, are entitled to their defined benefits — no more and no less.

The opinion below, over a vigorous dissent by Judge Norris, created a welter of circuit conflicts, and cannot reasonably be reconciled with this Court's decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996). Rather than harmonizing these conflicts, the brief in opposition only confirms them. That brief reaffirms the Ninth Circuit's holdings that (1) an employer's discretion to amend a contributory plan is subject to significant, but nonstatutory, limitations, and (2) a plan amendment can be challenged after the fact as an involuntary (indeed, unintentional) plan termination. Neither conclusion can be squared with the text, structure, or purpose of ERISA or the general body of law interpreting the statute. Indeed, the Pension Benefit Guaranty Corporation ("PBGC") — the federal agency that administers and enforces Title IV of ERISA — has filed an *amicus curiae* brief urging this Court to grant review.[1]

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[1] Respondents seek to avoid review by emphasizing the procedural posture of this case, which arises on a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). That emphasis is misplaced. This case is ripe for review because respondents have failed to state claims upon which relief can be granted *as a matter of law*. No further factual development is necessary or appropriate, because respondents' claims are simply not cognizable under ERISA. Indeed, this Court routinely grants review in cases from the lower federal courts in this posture, including some of the leading ERISA precedents. *See, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513 (1997); *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979).

2. Respondents first defend the panel majority's holding that ERISA implicitly limits an employer's discretion to amend contributory plans. According to respondents, the conflict between the decision below and the cases cited in the petition should be ignored because those cases predate *Spink*. *See* Opp. 21-22. That contention misses the mark. *Spink* ratified the law of nearly every circuit (other than the Ninth) by holding that the amendment (as opposed to the administration) of a plan does not implicate fiduciary duties under ERISA. *See* 116 S. Ct. at 1789 & n.4 (citing, *inter alia*, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994)). The holding below cannot be squared with either *Spink* or numerous appellate cases both before and after that decision. *See* Pet. 10-13. Indeed, the panel majority in this case effectively resurrected the Ninth Circuit's aberrant approach firmly rejected by this Court in *Spink* itself.

The panel majority purported to distinguish *Spink* on a ground never mentioned in this Court's opinion — that the defined-benefit plan at issue there was funded wholly by the employer. As noted in the petition, this ostensible distinction itself brings the decision below squarely into conflict with *Georgia-Pacific*, which involved a defined-benefit plan to which employees had contributed, and expressly rejected the very arguments embraced by the Ninth Circuit in this case. *See* Pet. 14, 18-19; *see also Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989).[2]

[2] Not surprisingly, the Third and Seventh Circuits have continued to follow these settled precedents after *Spink*. *See, e.g., Frahm v. Equitable Life Assurance Soc'y*, 1998 WL 81457, at *1 (7th Cir. Feb. 27, 1998) (applying *Spink* and *Georgia-Pacific* to contributory welfare plan); *Engelhart v. Consolidated Rail Corp.*, 127 F.3d 1095 (3d Cir. 1997) (affirming, without comment, decision rejecting claim that amendment of contributory defined-benefit plan implicated fiduciary duties and triggered pre-termination rights), *cert. denied*, 118 S. Ct. 1163 (1998).

Respondents also suggest that the conflict with *Georgia-Pacific* can be harmonized on the theory that there, unlike here, no allegation was made of a transfer of funds from one plan to another. *See* Opp. 20-21. That suggestion is baseless for three reasons. *First*, respondents do not contend — and the Ninth Circuit did not hold — that the 1989 amendment establishing the early retirement program involved a transfer of funds from one plan to another. Accordingly, respondents' attempt to distinguish *Georgia-Pacific* applies by its own terms to only one of the two amendments at issue here.

Second, in any event, the 1991 amendment creating a contributory benefit structure cannot remotely be characterized as the creation of a new plan. Both before and after that new benefit structure was established, all benefits paid out under the Plan came from a common fund. *See* Pet. 20 n.6. As a matter of law, accordingly, there is but a single plan with multiple benefit structures, not separate plans. *See id.* (citing authorities); Brief *Amici Curiae* of the Hughes Aircraft Retirees Ass'n and the Hughes Employees Ass'n 6-12.[3]

[3] Respondents assert that petitioners have not "sought review" on this issue because it is not specifically set forth among the "Questions Presented" in the petition. *See* Opp. 4; *see also id.* at 5 & n.2, 12. The petition, however, challenged the opinion below as "flawed" on this very point, and noted that "[a]s a matter of law, the addition of a new benefit structure to an existing plan does not give rise to a new plan." Pet. 20 n.6. Contrary to respondents' assumption, it is well-established that a petitioner need not set forth a separate question with respect to each and every issue raised. This Court's Rules specify that the questions presented must be "short" and "concis[e]," and that "[t]he statement of any question presented is *deemed to comprise every subsidiary question fairly included therein*." S. Ct. Rule 14.1(a) (emphasis added). Whether participants in a defined-benefit plan can state a cause of action under ERISA by simply alleging that an amendment created a new plan is obviously subsidiary to the broader question whether participants in a defined-benefit plan can state a cause of action under ERISA to recover more than their defined benefits. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 84-85 (1995); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

Third, and more generally, fiduciary duties simply do not attach to the act of amending a plan, *regardless* of the nature of the relevant amendments. *See Spink*, 116 S. Ct. at 1789 ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). Indeed, respondents repeat the very error that the Ninth Circuit committed in *Spink* of addressing the question whether fiduciary duties have been violated before addressing the antecedent question whether such duties exist in the first place. *See id.* at 1788-89. Decisions from the Third and Tenth Circuits confirm that ERISA's fiduciary duties simply are not implicated by plan amendments, even where those amendments involve a use of plan assets that benefits members of other plans. *See Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Salazar v. Sandia Corp.*, 656 F.2d 578, 579-80 (10th Cir. 1981).[4]

3. Respondents also assert that "[t]here is no conflict with other Circuits about employees' interest in their own contributions." Opp. 22. But they offer no support for that assertion, and fail to distinguish contrary authority from the Second, Third, and Seventh Circuits. *See* Pet. 16-20.

Respondents concentrate instead on arguing the merits of the issue, and here again their arguments are unavailing. Their principal argument rests on cases that have interpreted the asset-distribution provision of 29 U.S.C. § 1344. *See* Opp. 22-25. As the PBGC points out, however, plan participants have no entitlement to any "surplus" assets that may exist prior to plan termination, because any such "surplus" is wholly illusory

[4] Respondents' anti-inurement claim also fails for the same reasons that their fiduciary claims fail. ERISA's anti-inurement provision is the flip side of its fiduciary provisions: the former provision requires that plan assets not be used for the benefit of an employer, whereas the latter provisions require that plan assets be used for the exclusive benefit of plan participants. *Compare* § 1103(c)(1) *with* § 1104(a)(1)(A). Dismissal of the one therefore requires dismissal of the other, as even the Ninth Circuit recognized on remand in *Spink*. *See* 125 F.3d 1257, 1260-61 (9th Cir. 1997).

until the plan has been terminated and its liabilities satisfied. *See* PBGC Br. 13 ("[I]f there is no termination, there can be no surplus."); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 313 (3d Cir. 1982) ("ERISA does not provide a pre-termination right to the surplus."). Because the Plan has not been terminated, "section 1344 cannot make the respondents' causes of action cognizable." PBGC Br. 16; *see also infra* at pp. 6-9.

Respondents' secondary reliance on the accrued-benefits provision of 29 U.S.C. § 1053 is equally unavailing. *See* Opp. 19-20, 23-24. Both parties agree that this provision imposes a floor on defined benefits: the level of such benefits cannot be set any lower than the amount that would be generated by the application of a statutory rate of interest. *See* Pet. 18 n.4; Opp. 23. There is a vast and obvious difference between this undisputed right to defined benefits at least as great as those generated by an imputed rate of interest (which is set forth in the plain text of the statute) and the asserted right to any and all investment income generated by employee contributions to a defined-benefit plan (which is conspicuously absent from the statute). The statute creates an explicit entitlement to *defined benefits* at or above a minimum level, not an implicit entitlement to any or all *assets* in a plan. Thus, as the Seventh Circuit explained in *Georgia-Pacific*, plan participants have no right to restrict an employer's use of plan assets to fund plan liabilities, because such participants "do not own the assets of a defined-benefit pension plan." 19 F.3d at 1186-90; *see also Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia*, 23 F.3d at 828-33 & n.2.[5]

[5] Respondents' reliance on a footnote in *Spink* regarding "otherwise unlawful" actions, *see* Opp. 7, likewise provides no basis for their claims. The *Spink* Court left open the possibility that a "sham transaction, meant to disguise an otherwise unlawful transfer," might implicate ERISA's fiduciary duties. 116 S. Ct. at 1792 n.8. The amendments at issue here are not "otherwise unlawful" for the simple reason that they do not violate any other provision of ERISA.

4. Respondents also defend the Ninth Circuit's holding that they have stated a legally cognizable claim by alleging that Hughes involuntarily (and unintentionally) terminated the Plan in 1991 by adding the non-contributory benefit structure. As noted in the petition and underscored by the PBGC, *see* Pet. 21-22; PBGC Br. 7-16, the statute could scarcely be more explicit on this point: the "[e]xclusive means of plan termination" are (1) voluntary termination initiated by an employer, 29 U.S.C. § 1341(a)(1); and (2) involuntary termination initiated by the PBGC, *id.* § 1342. *See also PBGC v. LTV Corp.*, 496 U.S. 633, 638-39 (1990); PBGC Br. 7-8 & n.4. The Ninth Circuit defied this statutory command by devising a third, nonstatutory termination mechanism: involuntary termination resulting from the amendment of a plan in some significant (but undefined) way.

Respondents suggest that this approach does not deviate from ERISA because such a termination could be carried out *prospectively* pursuant to the Title IV procedures. *See* Opp. 6-7, 25. That suggestion, however, contradicts the allegation in respondents' own complaint that Hughes "terminated the Plan within the meaning of ERISA" on "January 1, 1991" by creating the non-contributory benefit structure. App. 141a. *See also id.* at 132a ("Plaintiffs' [*sic*] further contend that the Plan was terminated on January 1, 1991, entitling the participants to an equitable distribution of the surplus assets."); *id.* at 134a ("Effective January 1, 1991 the Plan was terminated and replaced by a new non-contributory plan."). The Ninth Circuit accepted these allegations at face value, and held that respondents had stated a legally cognizable claim that "Hughes' amendment terminated the contributory plan in 1991," *id.* at 11a, pursuant to the common law of trusts, *see id.* at 11a n.3, 22a-23a.

That holding — which respondents conspicuously decline to defend — conflicts not only with the plain language of the statute, but also with decisions from other circuits confirming that ERISA provides the exclusive means of plan termination,

see Pet. 22-24, and rejecting attempts by plan participants to force employers to terminate plans and distribute putative "surplus" assets, *see Chait v. Bernstein*, 835 F.2d 1017, 1019-20 (3d Cir. 1988); *cf. Morgan v. Independent Drivers Ass'n Pension Plan*, 975 F.2d 1467, 1468, 1471 (10th Cir. 1992). As the PBGC explains, ERISA's provisions governing the termination of defined-benefit plans are the "key provisions" that "form the heart of the program administered by PBGC." PBGC Br. 2. Title IV authorizes one and only one mechanism for involuntary plan termination, and that mechanism can be initiated only by the PBGC under very limited circumstances not present here. *See* 29 U.S.C. § 1342; PBGC Br. 7-8 & n.4. Because the statute is clear on this point, there is no room for judicial embellishment. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259-62 (1993). Thus, as the PBGC notes, the Ninth Circuit erred by "ignoring Title IV [and] holding that there may be a 'constructive' termination outside of Title IV." PBGC Br. 4-5.

Respondents argue that two of the cases cited by Hughes for the proposition that termination requires strict compliance with Title IV actually stand for the proposition that "a reluctant employer, in appropriate circumstances, can be ordered" to terminate a plan. Opp. 25 (citing *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), and *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990)). That contention distorts both cases, which simply note that courts can enforce an employer's *contractual* promise to terminate a plan voluntarily under specified circumstances. *See Beaumont Glass*, 62 F.3d at 580-81; *Phillips*, 914 F.2d at 34. Both cases thus fit comfortably within ERISA's framework, which allows employers to undertake obligations over and above those mandated by the statute, *see, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997), including an obligation to initiate a voluntary termination under specified circumstances. Needless to say, these principles have no application where, as here, an employer has not voluntarily undertaken to terminate a plan.

Respondents' attempt to negate the circuit conflict with respect to termination is thus unavailing. The Ninth Circuit is the only court of appeals ever to hold that a plan may be terminated by some means other than those expressly set forth in sections 1341 and 1342. That holding "casts aside the unambiguous statutory rules in Title IV of ERISA that have governed plan termination for almost a quarter of a century," PBGC Br. 3, and opens the floodgates to claims that employers "constructively" terminated plans by amending them. As underscored by petitioners' various *amici*, including the PBGC, the practical implications of the decision below are "disastrous." PBGC Br. 5.

Moreover, respondents have now made it clear that the termination issue is central to all of the other claims they have raised in this case. Their various allegations regarding violations of ERISA's fiduciary duties and structural provisions are inherently intertwined with their arguments about the supposed termination of the Plan. *See* Opp. 10-13, 17 n.8, 21, 22-23, 29. All of respondents' claims ultimately would lead the courts to rewrite the statute to accord themselves a broad discretionary role over the Nation's employee benefit plans, including not only pension plans but also health and 401(k) plans. *See* Brief *Amici Curiae* of the Chamber of Commerce of the United States of America and the Association of Private Pension and Welfare Plans 6-7, 14; Brief *Amicus Curiae* of the ERISA Industry Committee 4-5. From any perspective, therefore, the important issues of ERISA law raised in this case warrant review.

One final irony merits this Court's attention. Although respondents purport to represent a class of "all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan," App. 133a, the Ninth Circuit's decision is opposed by long-established associations of both retired and current Hughes employees. *See* Brief *Amici Curiae* of the Hughes Aircraft Retirees Association and Hughes Employees Association. Such opposition is entirely sensible,

because this lawsuit threatens the very existence of the Plan that guarantees those current and former employees a steady and dependable income stream throughout their retirement years. The destabilizing decision below thus threatens not only plan sponsors, but also the very plan participants it purports to benefit. *See* PBGC Br. 4; App. 48a (Norris, J., dissenting). The real "pot of gold" in this lawsuit is for the class-action lawyers.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and in the various *amicus* briefs, this Court should grant a writ of *certiorari*, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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No. 97-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,
Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE PENSION BENEFIT GUARANTY CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly-owned United States government corporation established by Congress to administer and enforce Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), which provides termination insurance to the nation's private sector defined benefit pension plans. *See* 29 U.S.C. §§ 1301-1461. The pension termination insurance program is vital to the retirement security of nearly 33 million American workers and retirees who participate in some 43,000 single-employer defined benefit plans vol-

untarily established and maintained by companies like petitioner Hughes Aircraft Company ("Hughes"). *See generally PBGC v. LTV Corp.*, 496 U.S. 633 (1990); *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980).[1]

The central issue in this case concerns the alleged termination of the Hughes Non-Bargaining Retirement Plan (the "Pension Plan"). Title IV of ERISA provides the applicable rules for such a plan termination. PBGC has an overwhelming interest in the proper interpretation of its organic statute, as these provisions form the heart of the program administered by PBGC.[2] Sections 1341 and 1342 of Title 29 are key provisions of Title IV, providing the *sole means* by which defined benefit plans can be terminated and their assets distributed. Section 1344 of Title 29, another integral part of the statute, governs the allocation of plan assets at termination. Title IV thus provides the clear and complete set of rules that *must* be followed to properly terminate a plan and then lawfully distribute plan assets in the course of the termination procedure.

The Ninth Circuit's decision, *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288 (9th Cir. 1997), *amended*, 128 F.3d 1305 (9th Cir. Oct. 23, 1997 & Jan. 23, 1998), ignores sections 1341 and 1342 and erroneously concludes that "ERISA does not define when a [plan] termination occurs." 105 F.3d at 1295 n.3, *amended*, 128 F.3d 1305.[3] The decision thus casts aside the unambiguous statutory rules in Title IV of ERISA that have governed plan termination for almost a quarter of a century, instead holding that the common law of trusts and an antiquated pre-ERISA Treasury Regulation guide this important determination.

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[1] PBGC, "an agency of the United States authorized by law to appear on its own behalf," files this *amicus curiae* brief pursuant to Supreme Court Rules 37.2(a) and 37.4 in support of the Petition for Writ of Certiorari filed February 5, 1998. *See* 29 U.S.C. § 1302(b)(1) (PBGC has the power "to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal"). PBGC has appeared in this Court through its own counsel both as a party, *see, e.g., LTV*, 496 U.S. 633; *Nachman*, 446 U.S. 359, and as an *amicus curiae*, *see, e.g., United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996); *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 621 (1993); *Commissioner v. Keystone Consol. Indus.*, 508 U.S. 152, 162 n.3 (1993); *Mead Corp. v. Tilley*, 490 U.S. 714, 722, 726 (1989).

PBGC's brief addresses only Title IV issues in this case, which are raised in petitioners' fourth "Question Presented." The Departments of Labor and Treasury have primary enforcement and interpretative authority over Titles I and II of ERISA, respectively. *See Reorg. Plan No. 4 of 1978*, 44 Fed. Reg. 1065 (1978), *reprinted in* 5 U.S.C. app. at 1582, 1583 (1994).

[2] For example, plan termination stops benefit and vesting accruals and fixes the benefits of participants. *See, e.g., In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 649 (2d Cir. 1983). PBGC's statutory mandate to pay guaranteed benefits to participants in underfunded plans applies only to plans that have been terminated in compliance with Title IV. *See* 29 U.S.C. §§ 1302(a)(2), 1322(a), and 1361. The plan termination date fixes the amount of the PBGC guarantee of plan benefits, *id.* § 1322, fixes the amount of liability to PBGC for plan underfunding, and is the date upon which a snapshot is taken of the entities responsible for any liability to PBGC for unfunded benefit liabilities *Id.* § 1362(a), (b).

[3] How it came to be that the Ninth Circuit opinion published in the Federal Reporter includes the quoted language is extraordinarily confusing. PBGC provided the Ninth Circuit with its views of the Title IV issues in this case by filing an *amicus curiae* brief in support of Hughes' petition for rehearing. The Ninth Circuit denied rehearing, but issued an amendment to the opinion that appeared to strike the quoted language. *See* Petitioners' Appendices B & C. However, the Order Amending Opinion and Denying Petition for Rehearing published at 128 F.3d 1305 shows the Ninth Circuit adhering to the quoted language. Even assuming that the Order published at 128 F.3d 1305 is incorrect, the majority opinion remains fundamentally wrong in its holding on plan termination. It still relies on the pre-ERISA Treasury Regulation for the incorrect proposition that termination is decided by the facts and circumstances of the particular case, and wrongly holds that respondents can prove entitlement to a distribution of "surplus" assets by establishing a nonstatutory "constructive" termination of the Pension Plan. 105 F.3d at 1295 n.3.

ERISA reflects

> Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering . . . benefit plans in the first place.

Varity Corp. v. Howe, 516 U.S. 489, 116 S. Ct. 1065, 1070 (1996). Evidence of this Congressional intent is found in Title IV's articulation of PBGC's first stated purpose "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants," 29 U.S.C. § 1302(a)(1), and its third stated purpose "to maintain premiums . . . at the lowest level consistent with carrying out [PBGC's] obligations under this title." *Id.* § 1302(a)(3).

A primary purpose of a defined benefit pension is the certainty it provides participants regarding the amount of their pension benefit in retirement. Congress provided further assurances of this retirement benefit by creating the termination insurance program of Title IV. Indeed, one of the most attractive aspects of Title IV is the certainty its comprehensive provisions provide to both workers and their employers. Without this certainty, employers surely would be less inclined to establish and continue defined benefit plans.

The decision below upsets the Congressional balancing that this Court identified in *Varity Corp. v. Howe* by removing the certainty created by the provisions in sections 1341 and 1342 on plan termination. It has thus jeopardized the orderly administration of plan termination and threatened the pension security of the thousands of workers and retirees in the Pension Plan, and possibly many more. *See, e.g., Jacobson,* 105 F.3d at 1312-13 (Norris, J., dissenting).

The panel majority did not stop at simply ignoring Title IV by holding that there may be a "constructive" termination outside of Title IV. It also held that former employees of Hughes can invoke 29 U.S.C. § 1344 to recover their "share" of the Pension Plan's alleged "surplus" assets at the time of the "constructive" termination. The ability to sue an ongoing plan for any temporary "surplus" in plan assets undermines the stability and attractiveness of defined benefit plans by serving as a disincentive for plan sponsors to have well funded plans. That result could be disastrous for defined benefit plans and plan participants, resulting in many more underfunded plans should there be an economic downturn or a general decline in the value of plan investments.

PBGC files this brief to explain why this Court should lift the dark cloud the Ninth Circuit decision has cast over the Pension Plan, PBGC's program and the rest of the universe of defined benefit plans. *Mead Corp. v. Tilley,* 490 U.S. 714, 726 (1989) (a failure to consider the views of PBGC when interpreting Title IV of ERISA is to "embark upon a voyage without a compass"); *see LTV,* 496 U.S. at 644 (certiorari granted in part "[b]ecause of . . . the importance of the PBGC's insurance program").

SUMMARY OF ARGUMENT

Sections 1341 and 1342 of Title 29 of the U.S. Code are the "*exclusive means*" by which a pension plan covered under Title IV of ERISA can be terminated. 29 U.S.C. §1341(a)(1). Section 1341 provides rules that an employer must follow when initiating the termination of a single-employer, defined benefit pension plan. Under section 1342, PBGC may initiate the termination of covered plans in specified circumstances. For both employer-initiated and PBGC-initiated terminations, section 1348 of Title 29 governs the selection of the statutorily significant plan termination date. Absent strict compliance with these rules, a pension plan covered under Title IV of ERISA simply cannot be terminated. The Ninth Circuit detoured from the orderly statutory course by recognizing an unde-

fined "constructive" termination as supplanting Title IV with an unprecedented common law means of defined benefit plan termination.

Although respondents' factual allegations must be accepted as true when ruling on a motion to dismiss, conclusions of law couched as factual allegations need not be accepted as true. *Papasan v. Allain*, 478 U.S. 265 (1986). Because respondents did not and could not allege that the Pension Plan was terminated in accordance with the requirements of Title IV of ERISA, the Ninth Circuit was wrong to accept the allegations of plan termination. As a matter of law, there simply cannot be any set of facts proven that would establish the Pension Plan terminated on January 1, 1991.

The Ninth Circuit also held that respondents here may claim an entitlement to "surplus" Pension Plan assets under a Title IV provision—29 U.S.C. § 1344—that, by its very terms, applies only in cases where a plan has first been terminated pursuant to section 1341 or 1342. Again, the majority opinion ignores the statutory language to reach its result.

The Ninth Circuit's holdings—(1) that a defined benefit pension plan can be terminated outside the parameters of Title IV of ERISA, and (2) that section 1344 provides an entitlement to "surplus" assets even where there has been no Title IV termination—cannot be reconciled with several decisions from other United States Courts of Appeals. This Court should correct the Ninth Circuit's failure to follow Title IV and resolve the conflict created between the Ninth Circuit and the unanimous holdings of other circuits.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN HOLDING THAT A DEFINED BENEFIT PENSION PLAN CAN TERMINATE WITHOUT COMPLYING WITH TITLE IV OF ERISA

As Judge Norris correctly observed in his dissent below, the question of whether plan termination has occurred is a pure question of law. *Jacobson*, 105 F.3d at 1306, 1308, 1310 (Norris, J., dissenting). However, the premise for the Ninth Circuit's decision is the court's unquestioning acceptance of respondent's legal conclusion—disguised as an allegation of fact—that the Pension Plan terminated upon a January 1, 1991 plan amendment. *Jacobson*, 105 F.3d at 1293, 1295 & n.3 (regarding count 1 of respondents' complaint), *id.* at 1298 (count 2), *id.* at 1300 (counts 3 and 4). The decision, which strikes at the heart of the Title IV termination insurance program, is fundamentally inconsistent with Title IV of ERISA. Moreover, even if the Ninth Circuit was correct in looking to the allegations in respondents' complaint, the complaint does not allege a valid plan termination in accordance with Title IV.

The requirements for the termination of defined benefit pension plans covered under Title IV of ERISA were prescribed by Congress itself in this "comprehensive and reticulated statute." *Nachman*, 466 U.S. at 361. A single-employer defined benefit pension plan may be terminated voluntarily only in a "standard" termination or a "distress" termination. 29 U.S.C. § 1341. Congress made clear that these two forms of plan termination constitute the "exclusive means of [employer-initiated] plan termination." *Id.* § 1341(a)(1).[4] The legislative history confirms that Title IV of ERISA sets forth the "sole and

---

[4] Section 1341(a) also provides that the *only* other way in which a covered plan can terminate is by PBGC instituting involuntary pension plan termination proceedings under 29 U.S.C. § 1342 if

exclusive means under which a qualified pension plan may be terminated." H.R. Rep. No. 99-300, at 289 (1986), *reprinted in* 1986 U.S.C.C.A.N. 756, 940.

Plans that have sufficient assets to pay all benefit liabilities are terminated voluntarily only in a "standard" termination. 29 U.S.C. § 1341(b).[5] This procedure requires the plan administrator to notify affected parties, including all participants and beneficiaries, that termination of the plan is intended as of a specified future date. The termination notice must be provided to participants and retirees not less than 60 days before the proposed termination date. *Id.* §§ 1341(a)(2), 1348(a)(1), (2). Later in the termination process, the plan administrator must file with PBGC a notice of the intended termination containing information about the plan and certifications by the plan administrator and plan actuary. The plan administrator must also separately notify each participant or beneficiary of the amounts of his or her benefit entitlement. *Id.* § 1341(b)(2). Unless PBGC determines, within the time prescribed by the statute, that the plan administrator has failed to comply with the statutory provisions, the plan administrator must distribute benefits to participants and beneficiaries as allocated in accordance with 29 U.S.C. § 1344. If the plan administrator complies with the termination requirements under section 1341(b), then the plan's termination date will be the date proposed in the notice of intent to terminate provided under section 1341(a)(2). *Id.* § 1348(a)(1).[6]

the agency determines those statutory criteria are met. PBGC has not commenced such proceedings in this case.

[5] The only other type of non-PBGC-initiated termination—a "distress" termination—requires the employer to demonstrate severe economic distress, and is generally applicable to underfunded plans. Because respondents have not alleged that the Pension Plan is underfunded, the rules for a "distress" termination are not implicated in this case.

[6] The plan termination date is of critical importance in fixing the rights of affected parties, such as participants, employers, and

Respondents did not and could not allege that any of the above procedures were invoked with respect to the Pension Plan. For example, there was not even a hint in the complaint that the participants had been provided with the required advance notice that the Pension Plan would terminate as of January 1, 1991. And, although the Ninth Circuit opinion repeatedly draws a distinction between contributory and non-contributory plans, the procedures for termination apply with equal force to both types of defined benefit plans.[7] Because plan termination can only occur by compliance with these procedures, as a matter of law the Pension Plan did not terminate on January 1, 1991 regardless of respondents' allegations to the contrary.

The Ninth Circuit ventured off this statutory course. Rather than applying the law as enacted by Congress, the court below erroneously applied principles from the common law of trusts and a pre-ERISA Treasury Regulation. *Jacobson*, 105 F.3d at 1295 n.3. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). In applying a "constructive" or "wasting trust" theory of termination and the "facts and circumstances" test of Treasury Regulation § 1.401-6(b)(1), the court below held that PBGC, plan sponsors and participants must review the facts and circumstances of each case to determine if and when the "object of the [pension fund's] settlor had been achieved. . . . Such a determination may require the help of experts." 105 F.3d at 1295 n.3. The Ninth Circuit has done exactly what this Court has cautioned courts not to do—it has used its authority to de-

PBGC. *E.g., Horn v. Berdon Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 128 (9th Cir. 1991). *See* note 2 *supra*.

[7] Title IV of ERISA does not recognize any differences between contributory and non-contributory defined benefit plans, other than the specific provisions in 29 U.S.C. §§ 1344(a)(1), (a)(2), and (d), for allocating assets after a proper plan termination.

velop a federal common law under ERISA to supplant the text of the statute. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 259 (1993).

The Ninth Circuit also erred in its view of which administrative regulations were "applicable." The court below relied upon a pre-ERISA Treasury Regulation in holding that the question of when a termination occurs is "to be determined with regard to all the facts and circumstances in a particular case." *Jacobson*, 105 F.3d at 1295 n.3 (citing Treas. Reg. § 1.401-6(b)(1)). But of course it is not. Both PBGC and the Department of Treasury have recognized as much and have promulgated regulations under ERISA that govern the termination of PBGC-covered plans. For example, Treas. Reg. § 1.401-0(a) makes clear the regulation cited by the Ninth Circuit "reflect[s] the provisions of [Code] section 401 prior to amendment by [ERISA]." *Id.* Moreover, post-ERISA regulations expressly confirm that Title IV of ERISA governs termination of PBGC-covered defined benefit plans. *See* 29 C.F.R. part 4041 and Treas. Reg. § 1.1411(d)-2(c).[8]

[8] More recent Treasury Department rulings "clarify the interrelationship between certain Code requirements and certain title IV provisions of [ERISA]." T.D. 7501, 42 Fed. Reg. 42,324 (1977). Treas. Reg. § 1.411(d)-2(c)(2) specifically applies the rules in Title IV of ERISA for determining whether a covered pension plan is considered terminated as of a particular date:

> (2) *Plans subject to termination insurance.* For purposes of this section, a plan to which title IV of the Employee Retirement Income Security Act of 1974 applies is considered terminated on a particular date if, as of that date—
>
> (i) The plan is voluntarily terminated by the plan administrator under section 4041 of the Employee Retirement Income Security Act of 1974, or
>
> (ii) The Pension Benefit Guaranty Corporation terminates the plan under section 4042 of the Employee Retirement Income Security Act of 1974.
>
> For purposes of this subparagraph, the particular date of termination shall be the date of termination determined under section 4048 of such Act.

Treas. Reg. § 1.411(d)-2(c)(2) (1977). *See, e.g.*, Rev. Rul. 89-87, 1989-2 C.B. 81 (July 3, 1989) ("a single-employer plan to which Title IV applies that has not been terminated under Title IV . . . will not have terminated for purposes of the [Internal Revenue] Code").

PBGC first prescribed regulations under section 1341 in 1975. *See* 40 Fed. Reg. 42,534 (1975). PBGC's regulations constitute the agency's interpretation of its organic statute. Those rules have undergone substantial changes to comport with amendments to the text of the statute. *See, e.g.*, 57 Fed. Reg. 59,218 (1992); 58 Fed. Reg. 4203 (1993). The current rules at 29 C.F.R. part 4041 continue to govern every step of the termination process, from the issuance of notices to affected parties that a covered pension plan will terminate, *see* 29 C.F.R. §§ 4041.23, .43, to distribution of assets and close-out of the plan, *see id.* §§ 4041.28, .47-.50, *printed in* 62 Fed. Reg. 60,424, 60,431-36 (Nov. 7, 1997).

It is abundantly clear that PBGC has consistently administered the Title IV insurance program understanding that compliance with the provisions of Title IV is the sole means by which a covered plan may be terminated. *See* 52 Fed. Reg. 33,318 (1987) ("Absent qualifying for [a standard or distress] termination, a single-employer plan cannot voluntarily terminate."); *see also* 29 C.F.R. § 4041.3(a) ("exclusive means of voluntary plan termination"). The adoption of regulations interpreting section 1341 and their modification over the years in response to Congressional actions and real world experience demonstrates PBGC's exercise of its agency expertise. "This practical agency expertise is one of the principal justifications behind *Chevron* deference." *LTV*, 496 U.S. at 651-52.

Not only is the opinion below contrary to the statute and relevant interpretive regulations, the Ninth Circuit's holding also is squarely in conflict with the settled law of several other Courts of Appeals on the issue of plan termination. In *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990), the "factual" allegation of plan termination was much more compelling than that here. The employer had

ceased operations and terminated all employees. Participants argued that the plan documents themselves provided that under these circumstances the plans were terminated, and sought a distribution of assets. *Id.* at 33. The Fourth Circuit held there could be no plan termination regardless of the interpretation of the plan documents because, agreeing with PBGC, "strict compliance with the statute is the sole means by which a pension plan subject to the provisions of ERISA may be terminated." *Id.* at 34. *Accord PBGC v. Mize Co.*, 987 F.2d 1059, 1063 (4th Cir. 1993) (quoting *Phillips*).

The Third and Fifth Circuits have also held there can be no plan termination outside of Title IV's statutory framework. *American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995) (quoting *Phillips*); *Matter of Esco Mfg. Co.*, 50 F.3d 315, 316 (5th Cir. 1995) (quoting legislative history stating that sections 1341 and 1342 "provide the sole and exclusive means under which a qualified pension plan may be terminated."); *see also Hall v. National Gypsum Co.*, 105 F.3d 225, 233 (5th Cir. 1997); *Chait v. Bernstein*, 835 F.2d 1017, 1020 (3d Cir. 1988).[9]

In sum, the statute, the regulations, and holdings from other circuits demonstrate that the Ninth Circuit erred as

[9] The sole case relied upon by the Ninth Circuit for the proposition that the Pension Plan can be terminated without Title IV compliance is the district court opinion in *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991), *aff'd in part sub nom., Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994). *See Jacobson*, 105 F.3d at 1295 n.3. Even assuming that opinion to be correctly decided, reliance by the Ninth Circuit was misplaced because the district court in *Gulf* recognized that it was without authority to terminate the pension plans, noting that "[c]omplete plan terminations are governed by § 4041 of ERISA." 764 F. Supp. at 1197. Upon remarking that two of the trusts involved were "wasting trusts that should have ben terminated," *id.* at 1204, the court ordered Chevron to submit termination papers to PBGC. *Id.* at 1215-16. The parties then settled this issue prior to review on appeal. *See Borst*, 36 F.3d at 1313 n.6.

a matter of law in holding that respondents may proceed on the assertion in their complaint of plan termination. The district court properly rejected these allegations as an erroneous legal conclusion. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("for the purpose of [a] motion to dismiss . . . [courts] are not bound to accept as true a legal conclusion couched as a factual allegation"). This Court should grant certiorari in order to remove the uncertainty created by the Ninth Circuit's holding that a plan can terminate without complying with the provisions of Title IV of ERISA.

II. THE NINTH CIRCUIT ERRED IN HOLDING THAT 29 U.S.C. § 1344 PROVIDES A BASIS FOR RECOVERY OF ALLEGED "SURPLUS" ASSETS IN A PENSION PLAN THAT HAS NOT TERMINATED

Not appreciating that as a matter of law the Pension Plan could not have terminated, the Ninth Circuit stated that the issue in the case is "the use by Hughes of surplus assets from the Contributory Plan." *Jacobson*, 105 F.3d at 1290-91. Thus, the opinion mistakenly concluded that respondents could be entitled to a distribution of their share of this "surplus" under 29 U.S.C. § 1344. 105 F.3d at 1300-01. Although section 1344(d) is ERISA's mechanism for *allocating* residual assets in terminating plans, the Ninth Circuit's application of section 1344 in this case is erroneous, and, if allowed to stand, could harm the nation's pension insurance program.

The Ninth Circuit's opinion turns section 1344 on its head because, simply put, no "surplus" or residual assets in a covered defined benefit pension plan can exist unless and until (1) the plan has been terminated in accordance with Title IV of ERISA, and (2) all of the plan's benefit liabilities have been satisfied. 29 U.S.C. § 1344(a), (d). But if there is no termination, there can be no surplus. As the dissent correctly noted, only "[*i*]*f* the Plan is terminated, *then* § 4044(d) of ERISA . . . kicks in and re-

quires an equitable distribution of the Plan assets [attributable to employee contributions] *after* all Plan liabilities are satisfied." *Jacobson*, 105 F.3d at 1306 (Norris, J., dissenting) (emphasis added). That much is plain from the face of the statute: "In the case of *the termination* of a single-employer plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan. . . ." 29 U.S.C. § 1344(a) (emphasis added). *See also* 29 C.F.R. § 4044.1 (section 1344 "contains rules for allocating a plan's assets when the plan terminates"). Indeed, in *Mead Corp. v. Tilley*, 490 U.S. 714 (1989), this Court explained how section 1344 operates:

> Title IV of ERISA requires that plan assets be distributed to participants in accordance with the six-tier allocation scheme set forth in § 4044(a), [which] provides that plan administrators first distribute nonforfeitable benefits guaranteed by the PBGC, 29 U.S.C. §§ 1344(a)(1)-(4) (1982 ed. and Supp. V); then "all other nonforfeitable benefits under the plan," § 1344(a)(5); and finally "all other benefits under the plan," § 1344(a)(6). . . . *If funds remain after "all liabilities of the plan to participants and their beneficiaries have been satisfied," they may be* [*distributed pursuant to section 1344(d)*].

490 U.S. at 717-18 (footnotes omitted) (emphasis added). Just as employers have no right to any excess assets pursuant to section 1344(d)(1) until all liabilities are satisfied, plan participants in contributory plans likewise have no right to any portion of the pension plan's assets before the plan has been lawfully terminated and *all* liabilities of *all* partipants and their beneficiaries have been satisfied. *See Brillinger v. General Electric Co.*, 130 F.3d 61, 63 (2d Cir. 1997). Then, and only then, can a proper determination be made of the plan's residual assets under section 1344.[10]

[10] Indeed, the court below's view of section 1344 is impossible to administer. This Court said in *Mead* that the amount of the plan's residual assets is determined *after* the plan administrator has "*first* distribute[d] nonforfeitable benefits guaranteed by the PBGC [in categories 1 through 4] . . . ." *Mead*, 490 U.S. at 717-18 (footnote omitted) (emphasis added). Category 2 allocations must provide "that portion of each individual's accrued benefit which is derived from the participant's mandatory contributions." 29 U.S.C. § 1344(a)(2). Accordingly, the plan administrator must allocate plan assets to category 2 benefits *before* he can know the amount of the plan's residual assets. But the Ninth Circuit's decision makes an equitable portion of the Pension Plan's "surplus" assets part of the respondents' accrued benefits *before* assets have been allocated in accordance with the six categories in section 1344(a). The Ninth Circuit's opinion thus requires plan administrators to know the amount of residual assets before they allocate assets in the manner that determines it.

The opinion's suggestion that section 1344 provides plan participants with an immediate right to plan assets in the absence of a termination done in compliance with Title IV is simply wrong. As Judge Norris correctly observed in his dissent,

> The existence of a "surplus" in a[n ongoing] pension fund is nothing more than an actuarial artifact. . . . [A] pension plan is "overfunded" at any point in time in which the present value of the Plan's assets exceeds the actuarially determined value of the Plan's liabilities.

105 F.3d at 1305 (Norris, J., dissenting). A plan's funded status, which may change from time to time, does not provide a basis for reading section 1344 differently, as the court below did. As this Court said in *Mead*:

> That § 4044(a) is a distribution mechanism and not a source for new entitlement also is illustrated by the structure of the statute. Title I of ERISA sets forth elaborate provisions to determine an employee's right to benefits. Those provisions describe in detail the accrual of benefits and the vesting of accrued benefits after service of a fixed number of years. Title IV, which contains § 4044(a), simply provides for insurance for benefits created elsewhere. It is incon-

ceivable that this section was designed to modify the carefully crafted provisions of Title I.

490 U.S. at 723.

Accordingly, the Ninth Circuit was clearly and seriously in error to suggest that section 1344 could provide respondents with a claim for benefits above and beyond what they would be enttiled to under Title I of ERISA. Again, the holding puts it at odds with other federal courts of appeal. The Second and Third Circuits have noted under similar circumstances that participants in a "contributory" defined benefit plan are not entitled to receive plan assets above their defined benefit, unless and until a plan has terminated in accordance with Title IV's statutory framework. *Brillinger,* 130 F.3d at 63-64; *Malia v. General Electric Co.,* 23 F.3d 828, 831-33 (3d Cir.), *cert. denied,* 513 U.S. 956 (1994).

Respondents in this case did not allege that the Pension Plan was terminated in accordance with Title IV of ERISA. Since the allegations of plan termination were therefore insufficient as a matter of law, there could be no asset "surplus" in the Pension Plan. And absent a legally sufficient allegation that the Pension Plan's residual assets have been improperly allocated, section 1344 cannot make the respondents' causes of action cognizable.

CONCLUSION

This Court should grant the petition for a writ of *certiorari,* and reverse the judgment below insofar as it addresses the termination of defined benefit plans and 29 U.S.C. § 1344.

Respectfully submitted,

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No. 97-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,
Petitioners,
v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, The Chamber of Commerce of the United States of America (the "Chamber") and The Association of Private Pension and Welfare Plans ("APPWP") respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of petitioners Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan. Petitioners have consented to the filing of this brief. Respondents have refused to give their consent, thus necessitating the filing of this motion.

1. The Chamber is the world's largest business federation, with an underlying membership of more than three million businesses and organizations of every size, and in

every sector and region of the United States. The Chamber serves as the principal voice of the American business community. One of its most important functions has been to represent the interests of its members in litigation pending before the courts of the United States.

The Chamber's members have a vital interest in the proper interpretation and application of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA. Many of these plans cover participants and beneficiaries in multiple states. Chamber members, accordingly, have a substantial interest in ensuring that ERISA is interpreted and applied in a uniform and consistent manner across the nation. The Chamber has sought to advance those interests by filing briefs in ERISA cases that present issues of exceptional importance to the business community. For example, the Chamber has participated as an amicus curiae before this Court in the following, recently decided ERISA cases: *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992); *Patterson v. Shumate*, 505 U.S. 123 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988).

2. The APPWP is a non-profit trade association founded in 1967 to protect and foster the growth of this nation's private employer-sponsored employee benefit plan system. The members of the APPWP include both small and large employers (including many Fortune 500 companies) which sponsor employee benefit plans, as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its more than 240 members sponsor or administer plans covering more than 100 million plan participants, including plans that have required employee contributions. This broad-based membership provides the APPWP with substantial expertise and experience in the entire spectrum of issues relating to all types of benefit plans.

3. Movants have a substantial interest in this case because many of their members sponsor defined-benefit pension plans, and a substantial number of these plans (as well as other plans sponsored by their members) have permitted or required employee contributions. The Ninth Circuit held (i) that an employer's amendment of its contributory plan is a fiduciary act, subject to ERISA's strict fiduciary constraints; and (ii) that a plan may have been "constructively terminated" by an amendment that modified its benefit structure based on a vague "facts and circumstances" test. These holdings threaten the ability of employers that have sponsored contributory plans to adopt benefit structures responsive to their competitive needs—for example, by establishing early retirement window programs, enhancing pension benefits for active employees, adding participants employed by a newly acquired subsidiary, or reducing the rate of pension benefit accruals for new employees. Employers, which are obligated to fund any shortfall in a defined-benefit plan, will be less likely to offer defined-benefit plans if any amendment effected while such a plan is overfunded can trigger a termination and distribution of all "surplus" plan assets.

On both of these issues, the Ninth Circuit plainly erred and announced rules of law that directly conflict with the uniform decisions of other courts of appeals. If the Ninth Circuit's decision stands, it will spawn (yet another) class-action cottage industry, with countless plaintiffs' lawyers setting their sights on "surplus" plan assets. Every employer that sponsors a defined-benefit or other contributory plan that covers even a single participant or beneficiary

who resides in the Ninth Circuit will face an increased risk of ERISA litigation and potential liability. Employers and plan administrators nationwide will have little choice but to file anticipatory declaratory judgment actions in circuits other than the Ninth.

Because the court of appeals' erroneous decision in this case has sweeping implications for the design and administration of employee benefit plans, and destroys the nationwide uniformity that Congress sought to ensure, we believe this Court's review is urgently needed. For the foregoing reasons, Movants respectfully request that they be allowed to participate in this case and file the accompanying Brief of *Amici Curiae* in support of petitioners.

Respectfully submitted,

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March 24, 1998

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE* [1]

The interests of *amici* are set forth in the preceding motion for leave to file this brief.

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[1] Pursuant to Rule 37.6 of the Rules of the United States Supreme Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit decided two issues of critical importance under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA")—and made hash of them both. Ignoring the plain text of ERISA and this Court's controlling precedents, the court of appeals held that: (1) if a benefit plan permits employees to contribute their own funds, an employer's actions as plan sponsor are transformed into fiduciary acts that may subject the employer to suit for breach of fiduciary duty under ERISA § 404; and (2) a defined-benefit pension plan can be deemed "constructively terminated" by an amendment that alters its benefit structure, even where the plan sponsor had no intent to terminate the plan and never initiated the steps required for plan termination under Title IV of ERISA, 29 U.S.C. §§ 1301-71. Both holdings are plainly wrong, and both are squarely in conflict with the uniform decisions of other courts of appeals. If these holdings are not reversed, they threaten to disrupt the ongoing operations of thousands of employee benefit plans, spawn nationwide class-action litigation over the lawfulness and effect of past amendments, and upset Congress's carefully constructed balance between protections afforded employees and burdens imposed on employers and plans.

1. Just two Terms ago, in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), this Court reversed the Ninth Circuit and ruled definitively that, when an employer amends its pension benefit plan, it acts in its capacity as settlor, not as a fiduciary. The Court made crystal clear that an employer is permitted to adopt, modify, or terminate its pension plan free from ERISA's fiduciary constraints. There is no basis in that decision, or in the text or structure of ERISA, for distinguishing pension plans that are funded solely by employers from those that require or accept employee contributions. In seeking to limit the holding in *Spink* to non-contributory plans and to announce a different, contrary rule for plans that receive employee contributions, the Ninth Circuit gave short shrift to this controlling precedent, the plain language of ERISA, and the uniform decisions of other courts of appeals.

The decision of the Ninth Circuit calls into question the lawfulness and validity of innumerable amendments to vast numbers of benefit plans that are not funded solely by the employer. Benefit plans that accept or require employee contributions are commonplace. Many employers offer contributory defined-benefit pension plans, just like the plan at issue in this case. Health plans also often require employees to make at least a modest contribution toward the cost of medical coverage for themselves and their families. And 401(k) plans, in which employees are able to defer part of their own income for retirement, are now the most common and the fastest growing type of retirement plan, especially among smaller businesses. If this decision stands, every amendment to any of these plans that, in form or effect, has benefited some employees more than others or redounded to the benefit of the employer—*i.e.*, virtually every substantive amendment—will be fodder for a class action lawsuit, with standards of liability to be determined case-by-case in future Ninth Circuit actions.

2. Section 4041 of ERISA says in plain English that the detailed procedures set forth in Title IV of ERISA constitute the "exclusive means" by which a defined-benefit plan may be terminated. 29 U.S.C. § 1341. Those procedures were not initiated in this case. Accordingly, the Hughes Non-Bargaining Retirement Plan (the "Plan") was not terminated within the meaning of ERISA. Yet the Ninth Circuit permitted respondents to proceed with a claim that, by making significant changes to the Plan, Hughes Aircraft Company ("Hughes") "constructively" terminated the Plan. The court of appeals' refusal to enforce the plain terms of ERISA places the Ninth Cir-

cuit in direct conflict with decisions of the Third, Fourth, and Fifth Circuits.

By adopting a vague, common-law standard of constructive termination, which requires consideration of "all of the facts and circumstances," the court of appeals has created the potential for class-action litigation every time a pension plan is amended. These suits may seek, as respondents do here, an immediate distribution if the pension plan's assets exceed (even temporarily) an actuarial estimate of its projected liabilities. Conversely, if the plan's assets are less than its estimated liabilities, a lawsuit might seek to compel the employer to make large additional contributions to fund the plan on a termination basis, even though the employer has complied fully with applicable annual funding requirements.

The *post hoc* determination that a plan has been constructively terminated may have serious adverse tax consequences for the employer and plan participants, jeopardize benefits accrued by participants since the date of "termination," and expose the Pension Benefit Guaranty Corporation ("PBGC") to billions of dollars of additional potential liability. The mere threat of a finding of constructive termination, moreover, will severely hamper the ability of employers which have sponsored contributory plans to adopt benefit structures responsive to current competitive needs—for example, by establishing early retirement window programs, enhancing pension benefits for active employees, adding participants employed by a newly acquired subsidiary, or reducing the rate of pension benefit accruals for new employees.

3. The court of appeals announced rules of law that directly conflict with the uniform holdings of every other court of appeals that has considered these issues. If the decision stands, every employer that sponsors a plan that covers so much as a single participant or beneficiary who resides in the Ninth Circuit will face an increased risk of

ERISA litigation and potential liability. This will create a tremendous incentive for employers and plan administrators to file anticipatory declaratory judgment actions in circuits other than the Ninth to insulate them from the prospect of Ninth Circuit-based lawsuits. Because the court of appeals' erroneous decision in this case has sweeping implications for the design and administration of employee benefit plans, and destroys the nationwide uniformity that Congress sought to ensure when it enacted ERISA, *amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

ARGUMENT

I. THE NINTH CIRCUIT'S OPINION CONFLICTS WITH CONTROLLING SUPREME COURT PRECEDENT, THE PLAIN LANGUAGE OF ERISA, AND THE UNIFORM DECISIONS OF OTHER COURTS OF APPEALS

A. An Employer Does Not Act as a Fiduciary When It Amends or Terminates a Benefit Plan to Which Employees Have Contributed

In their Second, Fifth, and Sixth Claims, respondents allege that Hughes breached the fiduciary duty of loyalty set forth in ERISA § 404(a)(1), committed transactions prohibited by ERISA § 406, and failed to operate the Plan (a contributory defined-benefit pension plan) "in accordance with the documents and instruments governing [the Plan]" (as required by ERISA § 404(a)(1)(D)), when it amended the Plan in 1989 to create an early retirement program, and in 1991 to introduce a noncontributory benefit structure. *See* Complaint (Pet. App. 131a-44a). These claims are squarely foreclosed by this Court's decision in *Lockheed Corp. v. Spink*, which held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 116 S. Ct. at 1789. *Spink* made crystal clear that, when employers undertake to adopt, amend or terminate ERISA plans, "they do not

act as fiduciaries, . . . but are analogous to settlors of a trust." *Id.*

The Ninth Circuit held that *Spink* did not control this case because the defined-benefit plan at issue in *Spink* did not accept employee contributions. According to the court of appeals, because the Plan accepts employee contributions, "Hughes was acting as a fiduciary when it 'amended' the [P]lan." Pet. App. 16a. As Judge Norris observed in dissent (Pet. App. 37a), this distinction is baseless.

The question in *Spink* was whether this Court would "extend" its ruling in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)—that the amendment of welfare benefit plans is not a fiduciary act—to encompass amendments to pension benefit plans. *Spink*, 116 S. Ct. at 1789. The Court observed in that regard that ERISA's "definition of fiduciary makes no distinction between persons exercising authority over welfare benefit plans and those exercising authority over pension plans. It speaks simply of a 'fiduciary with respect to a plan' 29 U.S.C. § 1002(21)(A), and of 'management' and 'administration' of 'such plan,' *ibid.* And ERISA defines a 'plan' as being either a welfare or pension plan, or both. *See* § 1002(3)." *Id.* at 1789-90. Likewise, the Court noted, "the fiduciary duty provisions of ERISA are phrased in general terms and apply with equal force to welfare and pension plans." *Id.* at 1790 (citing 29 U.S.C. § 1104(a)). Because neither ERISA's definition of "fiduciary" nor its provisions respecting the duties of fiduciaries differentiate between welfare and pension plans, the Court concluded that "the rules regarding fiduciary capacity—including the settlor-fiduciary distinction—should apply to pension and welfare plans alike." *Id. Spink* announced a general rule that "the act of amending a pension plan" —like the act of amending a welfare plan—"does not trigger ERISA's fiduciary provisions." *Id.*

The Court's decision in *Spink* did not distinguish, and left no room for any distinction, between contributory and

non-contributory plans. Just as ERISA's definiiton of "fiduciary" and its provisions respecting fiduciary duties do not differentiate between welfare and pension plans, they make no distinction between contributory and non-contributory plans. Section 3(21)(A) of ERISA provides that a person is a fiduciary "to the extent" that he or she exercises discretionary authority or control over a plan's management or administration or the investment of plan assets. 29 U.S.C. § 1002(21)(A); *see Lockheed Corp. v. Spink*, 116 S. Ct. at 1789; *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (Easterbrook, J.). ERISA thus defines fiduciary status solely by reference to the functions a person performs for a benefit plan, not by the source of the plan's funds. Paraphrasing the Court's decision in *Spink*, "the fiduciary duty provisions of ERISA are phrased in general terms and apply with equal force" to contributory and non-contributory plans. 116 S. Ct. at 1790.[2]

To the extent the court of appeals attempted to square its holding with ERISA's functional conception of fiduciary status, its reasoning does not withstand scrutiny. The court suggested that "Hughes was carrying out discretionary functions relating to plan management and administration when it 'amended' the plan to use surplus assets attributable in part to employee contributions" for three reasons: (1) the amendment "triggered ERISA's statutory duties with respect to assets attributable to employee

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[2] Contrary to the Ninth Circuit's view (Pet. App. 8a-9a), the fact that ERISA provides certain specific safeguards with respect to contributory pension plans, *see* 29 U.S.C. § 1053 (minimum vesting and nonforfeiture requirements); 29 U.S.C. § 1344(d)(3)(A) (equitable distribution upon termination), does not afford the courts authority to fashion other, non-statutory safeguards from federal common law. As this Court recognized in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." 508 U.S. at 262.

contributions"; (2) the amendment caused a disposition of the Plan's assets, which "necessarily affected the management and administration of the [P]lan"; and (3) "the use of surplus assets from one plan to fund another plan that benefits new employees who were never participants in the first plan" may "increase the risk of underfunding and non-payment." Pet. App. 16a. Each of these rationales suffers the same fatal defect: Irrespective of whether an amendment to a plan triggers fiduciary duties, impacts the management or administration of the plan, or adversely affects the plan's financial condition, the amendment is itself not a fiduciary act. Were the rule otherwise, *Spink* would have come out the other way, because Lockheed's creation of an early retirement option funded by existing plan assets unquestionably affected the financial condition of Lockheed's pension plan.

Finally, there is no merit to the court of appeals' suggestion that Hughes acted in a fiduciary capacity when amending the Plan because "when a plan is funded by both employer and employee contributions, both the employer and the employees are *co*-settlors." Pet. App. 14a. This "*co*-settlors" concept—which the court appears to have fabricated from whole cloth—has no application to plans covered by ERISA. Section 3(16)(B) of ERISA defines "plan sponsor" (the ERISA equivalent of a common-law settlor) of a single-employer plan, contributory or non-contributory, to be "the employer." 29 U.S.C. § 1002(16)(B). Thus, Hughes (and Hughes alone) is the sponsor/settlor of the Plan.[3] Moreover, even if Hughes'

[3] The Court appears to have introduced this "co-settlors" concept in order to reconcile ERISA's fiduciary duties with the Court's misapprehension that, under 29 U.S.C. § 1344, employees have a claim to the "surplus" assets of contributory defined-benefit plans. As the nomenclature suggests, however, what participants in "defined-benefit" plans have a right to are the *benefits* promised by such plans. The employees have no direct claim to the *assets* of a defined-benefit plan unless the plan has been terminated in accordance with the provisions of Title IV of ERISA. *See* Pet. 16-20.

employees were considered *co*-settlors, because the Plan gives the power to amend only to Hughes, the existence of other settlors would not transform Hughes' exercise of that power into a fiduciary function.

Every other court of appeals that has ruled on the question has held that, when an employer amends a contributory pension plan, it does so as settlor of the plan, not as a fiduciary. *See Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d at 1188; *Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). Indeed, we are unaware of any decision, other than the Ninth Circuit's decision in this case, which has held that the well-established distinction in ERISA between an employer's actions as plan settlor and its actions as plan fiduciary is in any way altered because a benefit plan requires employee contributions. The decision in this case destroys a uniform rule grounded in two decades of case law, which culminated just two Terms ago in *Spink*.

B. Title IV of ERISA Establishes the Exclusive Means for Terminating a Defined-Benefit Pension Plan.

Section 4044 of ERISA requires a plan administrator to distribute the assets of a single-employer defined-benefit pension plan "[i]n the case of [its] termination." 29 U.S.C. § 1344(a). In their Fourth Claim, respondents allege that, by amending the Plan in 1991 to establish a new non-contributory benefit structure, Hughes "terminated the Plan within the meaning of ERISA § 4404" [*sic*], Complaint ¶ 42 (Pet. App. 141a), and that respondents are therefore entitled to share in an equitable distribution of the Plan's residual assets, *id.* ¶¶ 42-43. Relying initially upon a superseded 1963 Treasury Regulation, 26 C.F.R. § 1.401-6(b)(1), and the common-law concept of a "wasting trust," the court of appeals concluded that respondents' claim of "constructive termination" stated a

cause of action, and ruled that whether a plan has been constructively terminated must be determined based on "all the facts and circumstances in a particular case." Pet. App. 11a n.3, 22a-23a.

Petitioners and their *amici* pointed out in briefs urging rehearing that the cited Treasury Regulation reflected pre-ERISA law, and that ERISA § 4041(a)(1) and post-ERISA Treasury Regulations make clear that compliance with the requirements of Title IV or ERISA is the *exclusive means* of terminating a single-employer defined-benefit plan. *See* 29 U.S.C. § 1341(a)(1); 26 C.F.R. § 1.411(d)-2(c)(2). The PBGC, which filed an *amicus* brief supporting rehearing, explained that, under Title IV of ERISA, Hughes could not have terminated the Plan without first filing a notice of intent with the PBGC and following specified statutory termination procedures. Brief for PBGC at 5-6, *Jacobson v. Hughes Aircraft Co.*, No. 93-55392 (9th Cir. Feb. 20, 1997). Respondents did not suggest, nor could they, that these prerequisites had been met. In response to these filings, the panel amended its original opinion to delete one of its two references to the pre-ERISA Treasury Regulation (*see* Pet. App. 22a-23a, 49a-52a), but inexplicably retained the other citation to the superseded regulation and stood by its holding that whether the Plan was "constructively terminated" is a matter that would have to be decided by the district court based upon an examination of the facts and circumstances of the case.

The court of appeals' holding on this issue is indefensible. ERISA § 4041 states without qualification that Section 4041 (which addresses voluntary terminations by a plan administrator) and Section 4042 (which addresses involuntary terminations by the PBGC) are the "[e]xclusive means" of terminating a single-employer defined-benefit pension plan. 29 U.S.C. § 1341(a)(1); *see also* H.R. Rep. No. 99-241, pt. II, at 41 (1985) ("[T]he

Committee intends that ERISA provide the sole and exclusive means under which a qualified pension plan may be terminated."), *reprinted in* 1986 U.S.C.C.A.N. 685, 699; H.R. Rep. No. 99-300, at 289 (1985), *reprinted in* 1986 U.S.C.C.A.N. 756, 940. To the extent that this language requires any amplification, the PBGC, which has been charged by Congress with the responsibility for administering Title IV of the Act, concurs that, "[a]bsent qualifying for [a standard or distress termination under ERISA §§ 4041 or 4042], a single-employer plan cannot voluntarily terminate." 52 Fed. Reg. 33,318 (1987); 29 C.F.R. § 4041.3(a) (Part IV of ERISA provides "[e]xclusive means of voluntary plan termination"). Treasury Regulations adopted after ERISA was enacted are consistent with this principle, providing that an ERISA plan covered by Title IV is "considered terminated" on the date a plan is "terminated . . . under section 4041 . . . or . . . section 4042 of [ERISA]." 26 C.F.R. § 1.411(d)-2(c)(2). These regulations confirm that the regulation relied upon by the court of appeals reflects the applicable law "prior to amendment by the Employee Retirement Income Security Act of 1974." 26 C.F.R. § 1.401-0(a).[4]

The court of appeals erred when, in the face of unequivocal statutory language, supported by the agencies charged with its administration, it relied on the common-law concept of "wasting trusts" to support a charge of "constructive" termination. *See* Pet. App. 11a n.3 (citing *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1201-05 (S.D. Tex. 1991), *rev'd in part on other grounds sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308, 1313 n.6 (5th Cir. 1994)[5], *cert. denied*, 115 S. Ct. 1699 (1995)).

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[4] Treas. Reg. § 1.401-6 remains applicable for governmental plans and church plans, to which I.R.C. § 411 generally does not apply. *See* 26 U.S.C. § 411(e).

[5] Even if the "wasting trust" doctrine were a viable concept under ERISA, we fail to see how a plan in which active employees continue to accrue additional benefits could be considered a "wast-

This Court has explained time and again that, while it is appropriate to look to common-law concepts to determine the meaning of undefined statutory terms or otherwise to fill the interstices of ERISA (*see Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989)), "[t]he authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (citation omitted); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985).[6]

In accordance with ERISA's plain language and clear congressional intent, every other court of appeals that has ruled on the issue has concluded that "strict compliance with [Title IV] is the *sole means* by which a pension plan subject to the provisions of ERISA may be terminated." *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990) (emphasis added); *accord American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 578-79 (3d Cir. 1995) (same); *Pension Benefit Guarantee Corp. v. Pritchard (In re Esco Mfg. Co.)*, 50 F.3d 315,

ing trust." At common law, the concept was limited to circumstances in which the purposes of a trust had been "fully performed without exhausting the trust estate." *Restatement (Second) of Trusts* § 430 (1959). Because active employees are continuing to accrue benefits under the contributory benefit structure, the purposes of this aspect of the Plan have not been "fully performed," and, notwithstanding the existence of any current surplus, there is no assurance that these purposes will be fully performed without exhausting the assets of the plan.

[6] Notwithstanding its discussion of wasting trusts, the court in *In re Gulf Pension* appears to have recognized that a plan cannot be terminated absent compliance with Title IV. *See* 764 F. Supp. at 1204, 1215-16. At any event, the Fifth Circuit has since ruled squarely that a defined-benefit pension plan "may be terminated only in accordance with" ERISA § 4041. *Pension Benefit Guarantee Corp. v. Pritchard (In re Esco Mfg. Co.)*, 50 F.3d 315, 316 (5th Cir. 1995).

316 (5th Cir. 1995) ("Section 1341 allows for termination of an ERISA plan only by the plan administrator or the PBGC and states that a single-employer plan may be terminated only in accordance with that section.").

Respondents do not allege that the Plan was terminated pursuant to the procedures required by Title IV of ERISA. They do not assert that Hughes filed the written notice of intent to terminate required by ERISA § 4041(a)(2), or that the PBGC applied for the appointment of a trustee pursuant to ERISA § 4042(b). Indeed, by respondents' own acknowledgement, employees continue to accrue benefits under the Plan, *see* Complaint ¶¶ 27-30 (Pet. App. 138a), which cannot occur when a Plan has been terminated under Title IV. *See Blessitt v. Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1171 (11th Cir. 1988) ("The three agencies charged with administering ERISA—the PBGC, the IRS, and the Department of Labor—all concur that benefit accrual ceases when a plan terminates."). These undisputed facts prove *as a matter of law* that the Plan was not terminated. The court of appeals erred when it permitted respondents to survive a motion to dismiss by alleging an ultimate conclusion—that the Plan was terminated within the meaning of Title IV of ERISA—which their factual allegations plainly did not support.[7]

[7] As petitioners explain (Pet. 20 n.6), the Ninth Circuit also erred as a matter of law in failing to dismiss respondents' allegation that the 1991 amendment created a second, distinct, noncontributory plan, because it is undisputed that the contributory and noncontributory benefits were paid from a single trust. *See* 26 C.F.R. § 1.414(1)-1(b)(1) ("A plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. . . . A plan will not fail to be a single plan merely because . . . [t]he plan has several distinct benefit structures which apply either to the same or different participants."); 26 C.F.R. § 1.410(b)-7(b) (same). As Judge Norris observed in dissent, the "1991 amendment did not create a separate pension plan; it merely added an alternative benefit structure under the existing Plan." Pet. App. 30a-31a.

II. THE DECISION OF THE COURT OF APPEALS THROWS INTO DOUBT THE VALIDITY AND EFFECT OF AMENDMENTS TO COUNTLESS EMPLOYEE BENEFIT PLANS AND, IF NOT REVERSED, WILL EXPOSE PENSION PLANS AND THE FEDERAL COURTS TO AN ONSLAUGHT OF CLASS-ACTION LITIGATION

The lower court's holding that the amendment of a contributory plan is a fiduciary act will subject employers to the risk of massive retroactive liability and may cause the demise of benefit plans that afford beneficiaries the opportunity to contribute funds. The impact of the decision is staggering. Employers sponsor contributory defined-benefit pension plans with more than $60 billion in assets and covering more than one million employees. *See* Pet. App. 49a-50a. In addition, most of this nation's health plans require employees to make at least a modest contribution toward the cost of medical coverage for themselves and their families. *See, e.g.*, Office of Chief Economist, Department of Labor, *A Look at Employers' Costs of Providing Health Benefits* (July 31, 1996) (76% of full-time employees in medium and large firms contributed toward employer-provided health premiums for family coverage in 1993). 401(k) plans, in which employees are able to defer part of their own income for retirement, are now the most common and the fastest growing type of retirement plan, especially among smaller businesses. Jeffrey A. Meder, *Employers See Duty to Offer Pension Plan, But Ask Employees To Do More*, 48 Employee Ben. Plan Rev. 40 (Mar. 1994) (73% of new retirement plans adopted within the last five years were 401(k) plans. By holding that the employers who sponsor these plans are subject to ERISA's strict fiduciary standards with respect to their decisions respecting plan design and amendment, the court of appeals has thrown into question the validity and effect of countless amendments, and paralyzed these employers' ability to modify the terms and structure of their plans in response to changing market conditions.

The standard of liability applied in this case—which appears to turn on whether an amendment benefited some employees more than others—demonstrates why Congress did not hold employers to fiduciary standards. Employers design benefit plans to motivate employee behavior, and to that end they frequently modify plan structure and plan benefits in ways that purposefully differentiate among classes of employees; for example, to attract talented employees from competitors, to settle strikes and unfair labor practice charges, or to retain employees or increase turnover. The Supreme Court specifically held in *Spink* that these amendments constitute a permissible use of plan assets. 116 S. Ct. at 1791. The Ninth Circuit, however, has once again placed employers who enact these commonplace amendments in legal jeopardy. If employers cannot modify contributory benefit plans to respond to changing competitive conditions without the risk of liability under ill-defined anti-inurement, fiduciary duty, and prohibited transaction rules, they will increasingly elect not to offer such plans.

That turn of affairs would not promote the interests of beneficiaries. As the record in this case indicates, plans that offer participants the chance to contribute their own funds often afford those participants a higher level of defined benefits to support their retirement. There can be no question, however, that, if this decision stands, employers will have every incentive to avoid the creation of such opportunities in the future. Under the court of appeals' decision, employers would retain far more flexibility, and far less exposure to liability, by prohibiting employee contributions.

The court of appeals' adoption of a common-law theory of "constructive termination" will similarly displace important legal principles established by ERISA. When employers amend their plans, they commonly extend new benefit schedules only to current or future employees.

The notion that such an amendment—or perhaps other "facts and circumstances"—may effect a "constructive termination" of a plan places innumerable plans in immediate jeopardy. How is an employer or plan administrator to decide if its plan was "constructively" terminated when, for example, it created an early-retirement incentive or modified the contribution formula for current or future employees? Are all employers now required to review all past amendments to determine whether a plan was overfunded at the time of the amendment? By how much does a plan have to be overfunded to qualify as a "wasting trust"? If the decision of the court of appeals is not reversed, these become critical questions, with serious practical and tax consequences for the employer and its employees. Moreover, because ERISA provides that accruals must cease immediately upon plan termination, *Blessitt*, 848 F.2d at 1171, the Ninth Circuit's decision places at risk all benefits accrued by active employees since the "constructive termination." *See* Pet. App. 48a (Norris, J., dissenting).

The decision of the court of appeals creates an irresistible incentive for forum shopping by class-action counsel. Given the interstate reach of many employee benefit plans, and the liberal venue and universal service of process provisions of ERISA, every plan with so much as a single participant or beneficiary who resides in the Ninth Circuit will be exposed to the threat of litigation there on behalf of all of its participants or beneficiaries nationwide.[8] The Ninth Circuit's opinion represents an open invitation to plaintiffs' lawyers across the country to attack and dismantle benefit plans. Those suits may seek, as respondents do here, to have surplus assets distributed under

[8] *See* 29 U.S.C. § 1132(e)(2) (affording nationwide service of process and allowing suit to be brought in any district where the plan is administered, where an alleged breach took place, or where the defendant resides or may be found).

ERISA § 4044 if a pension plan's assets exceed (even temporarily) an actuarial estimate of the plan's projected liabilities. Conversely, if the plan's assets at the time of amendment are less than its estimated liabilities, a lawsuit might seek to compel the employer to make large additional contributions to fund the plan on a termination basis pursuant to ERISA § 4041(c), even though the employer has complied fully with the annual funding requirements of ERISA § 302 and Internal Revenue Code § 412.

Plan administrators, in turn, who are duty-bound not to implement plan amendments that violate provisions of ERISA, 29 U.S.C. § 1104(a)(1)(D), and may be held personally liable to make the plan whole for benefits paid under an amendment that violates the anti-inurement rules, 29 U.S.C. § 1109, will have no choice but to seek declaratory relief proactively (in forums other than the Ninth Circuit) to obtain guidance respecting plan administration and to insulate themselves from the threat of Ninth Circuit-based lawsuits.[9] Such litigation will only contribute to the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

CONCLUSION

This Court has repeatedly intervened in ERISA cases when aberrational decisions by lower courts have threatened to upset Congress's carefully crafted scheme by imposing additional, nonstatutory burdens on employers and plans. *See, e.g., Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). Regrettably, this case necessitates the same

[9] This would be all the more true if the plan is administered by an independent third-party administrator. A third-party administrator's expertise is in day-to-day administration of plan. They typically have little knowledge about the employer's business, and would have no way to know whether the plan amendments provide too great a benefit to the employer compared to the gain to participants and beneficiaries.

corrective action. Because the court of appeals' erroneous decision in this case has sweeping implications for the amendment of employee benefit plans, and destroys the nationwide uniformity that Congress sought to ensure, *amici* respectfully urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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March 24, 1998

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No. 97-1287

In The

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY, *et al.*

Petitioners,

v.

STANLEY I. JACOBSON, *et al.*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION OF THE ERISA INDUSTRY COMMITTEE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF THE ERISA INDUSTRY COMMITTEE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The ERISA Industry Committee ("ERIC") hereby moves, pursuant to Rule 37.2.(b), for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari. Petitioners have consented to the filing of the attached brief. A letter evidencing petitioners' consent has been lodged with the Clerk. Respondents, however, have declined to consent.

ERIC is a nonprofit organization representing over 130 major employers. It frequently participates as *amicus curiae*

in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1]

Virtually all of ERIC's members maintain one or more defined-benefit pension plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* A substantial number of those plans, including some of the very largest pension plans in the United States, accept or require employee contributions or have done so in the past. The opinion of the court of appeals has potential far-reaching effects for virtually all defined-benefit pension plans that have or have had an employee contribution feature, and quite possibly for many other employee benefit plans with contributory features.

The court of appeals held that plan amendments that add an early retirement feature and that create a new benefit formula for plan participants who do not contribute to the plan are subject to attack as breaches of fiduciary duties owed to other plan participants. This conclusion is of great interest and concern to the members of ERIC and numerous other employers who maintain defined-benefit and other plans.

The conclusion by the court of appeals that a plan amendment that adds a new benefit formula for some participants can be found to constitute a "constructive termination" of the plan for purposes of ERISA also is of great concern to ERIC and its members. Since plan amendments of this sort are quite common, and since the termination of a plan has enormous consequences for both

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[1] For example, ERIC participated as an *amicus* before this Court in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), *rev'g* 60 F.3d 616 (9th Cir. 1995). *See also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

employers and employees, the members of ERIC have a vital interest in the appropriate resolution of this issue.

Because it represents numerous employers, ERIC is in a position to provide a broader perspective than any party to this litigation can provide. Because the issues posed by the court of appeals' decision are so far-reaching and significant, the Court may benefit from having that broader perspective before it when it considers whether to grant the Petition for Writ of Certiorari. Accordingly, ERIC respectfully requests that its motion for leave to file a brief *amicus curiae* in support of that petition be granted.

Respectfully submitted,

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BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

The ERISA Industry Committee ("ERIC") submits this brief *amicus curiae* in support of the Petition for Writ of Certiorari.

INTEREST OF *AMICUS CURIAE*

ERIC's interest is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

The Court should grant the petition for the following reasons:

The conflict on the breach of fiduciary duties issue between the court of appeals' decision and this Court's decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996), and between the court of appeals' decision and the decisions of other circuits, is particularly acute. As matters now stand, a plan amendment that would be held to be clearly lawful in several circuits could be held unlawful in the Ninth Circuit, so that the legality of a plan amendment could turn on the fortuitous circumstance of which of many possible jurisdictions the litigation is filed in. The uncertainty engendered by the court of appeals' decision thus creates a substantial deterrent to the adoption of plan amendments offering new or enhanced benefits for participants.

The holding of the court of appeals that participants in a contributory defined-benefit plan have a broad beneficial ownership interest in the plan's so-called "surplus" is contrary to the holdings of at least three other circuits, is based on an erroneous extrapolation from two narrowly-focused statutory provisions, and is likely to have (until reversed) a serious unsettling effect on the development and administration of employee benefit plans.

The holding by the court of appeals that the question whether a plan has been terminated, constructively or otherwise, presents an issue of fact is inconsistent with the holdings of other circuit courts to the effect that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* provides the exclusive means of terminating a defined-benefit plan.

Pursuant to Supreme Court Rule 37.6, ERIC states that this brief was not prepared, written, funded or produced by any person or entity other than ERIC or its counsel.

ARGUMENT

I. UNTIL IT IS REVERSED OR OVERRULED, THE DECISION BELOW ON THE BREACH OF FIDUCIARY DUTIES ISSUE WILL BE A SOURCE OF CONSIDERABLE UNCERTAINTY AMONG SPONSORS OF ERISA PLANS AND A SUBSTANTIAL DETERRENT TO THE ADOPTION OF PLAN AMENDMENTS OFFERING NEW OR ENHANCED BENEFITS TO PARTICIPANTS.

Less than four years ago, a unanimous panel of the Seventh Circuit held that retiree-participants in a contributory defined-benefit pension plan had no claim for breach of fiduciary duty under ERISA with respect to a plan amendment that eliminated the plan's "surplus" by greatly increasing the benefit obligations to existing employees (but not to retirees) in the event of a hostile takeover. *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188-90 (7th Cir. 1994) (Easterbrook, J).[1]

Less than two years ago, this Court held, *inter alia*, that plan amendments creating new benefit opportunities for employees who, among other things, are willing to release all their existing legal claims against the employer are not "prohibited transaction[s]" and do not implicate any of the fiduciary duties imposed by ERISA. *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1790, 1792 (1996).

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[1] Other circuits also have concluded that employer amendments to ERISA plans do not implicate ERISA's fiduciary duties. *See, e.g.*, *Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Musto v. American Gen. Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Salazar v. Sandia Corp.*, 656 F.2d 578, 580 (10th Cir. 1981).

Now a two-member panel majority in the Ninth Circuit has rendered perilous any reliance on *Johnson* and its progeny,[2] and any reliance on *Lockheed* if the plan has accepted employee contributions. The panel majority's decision squarely conflicts with *Johnson* and its progeny, and purports to distinguish *Lockheed* in ways that are quite at odds with the language and rationale of this Court.[3]

Today, employers that have added early retirement and other benefit improvements to their contributory plans in recent years, possibly in reliance on *Lockheed*, *Johnson*, and similar decisions, face the prospect of defending costly litigation predicated on the court of appeals' decision. Literally thousands of plans with cumulatively millions of

[2] The panel majority attempted to reconcile its decision with *Johnson* on the ground that *Johnson* involved only an increase in benefits for active employees who already were plan participants, while the plaintiffs in this case alleged a transfer of plan assets for the benefit of yet-to-be hired employees. *See* Pet'r App. 17a. However, the panel majority held that petitioners may be liable for a breach of fiduciary duty because they used plan assets to provide eligible employees with a new early retirement opportunity. *Id.* at 25a. Since only current active employees can possibly qualify for early retirement benefits, the court of appeals' effort to distinguish *Johnson* is baseless.

[3] The Ninth Circuit in *Lockheed* held that the addition of an early retirement feature to a plan, at least where participation in that benefit was conditioned on the employee executing a release of various legal claims against the company, constituted an impermissible use of plan assets for the benefit of the employer and thus a breach of the employer's fiduciary duty. *Spink v. Lockheed Corp.*, 60 F.3d 616, 622-24 (9th Cir. 1995). This Court reversed, not as the Ninth Circuit now contends because Lockheed employees made no contributions to the plan, but because the addition of new benefits to a pension plan is a settlor function that does not implicate ERISA's fiduciary duties. *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1790 (1996). That rationale does not support the distinction the Ninth Circuit now seeks to draw between contributory and noncontributory plans.

participants and combined assets of billions of dollars are put at risk by the court of appeals' decision.[4] Moreover, because ERISA contains very permissive jurisdiction and venue provisions, *see* ERISA Section 502(e)(2), 29 U.S.C. § 1132(e)(2), it is often difficult if not impossible to predict the circuit in which litigation will occur. For employers that are contemplating adding new benefits to their contributory plans and that could be sued in the Ninth Circuit, as would be true for many larger employers, the prudent course may be to defer adoption of any improvements in plan benefits until the uncertainty caused by the decision below is clarified. While such a wait-and-see approach might be a sound business decision, it is contrary to one of the primary purposes of ERISA: the creation of a uniform body of law that encourages employers to adopt and upgrade employee benefits. *See, e.g.*, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8-11 (1987). Thus, prompt review and resolution of the conflict by this Court is highly desirable from the standpoint of millions of employees throughout the country.

[4] In 1993, the latest year for which full data have been published, there were 83,596 single-employer defined-benefit plans in the United States, of which 59,372 reported complete actuarial data. U.S. Dep't of Labor, *Funding Status of Defined Benefit Plans*, Private Pension Plan Bulletin Number 6 at 63-64 (Winter 1997). Among those reporting complete actuarial data, 47,023 were "fully funded" plans, with total assets of $827 billion, with "net excess assets" — or "surplus" — of nearly $235 billion and with nearly 26 million participants. *Id.* While it is probable that substantially less than half of these plans accept or once accepted employee contributions, clearly the court of appeals' opinion has potentially very serious far-reaching effects.

II. THE HOLDING OF THE COURT OF APPEALS THAT PARTICIPANTS IN A CONTRIBUTORY DEFINED-BENEFIT PLAN HAVE A BROAD BENEFICIAL OWNERSHIP INTEREST IN THE PLAN'S SO-CALLED "SURPLUS" IS CONTRARY TO THE HOLDINGS OF AT LEAST THREE OTHER CIRCUITS AND IS BASED ON AN ERRONEOUS EXTRAPOLATION FROM TWO NARROWLY-FOCUSED STATUTORY PROVISIONS.

In rejecting the conclusions of at least three other circuit courts,[5] the panel majority reasoned that the so-called "surplus" in a defined-benefit plan that is attributable to employee contributions is a distinct asset in which plan participants enjoy something akin to an ownership interest. "By statutory definition," the panel majority concluded, "employees are vested in their own contributions and the income generated therefrom." Pet'r App. 21a.

This is a serious misapprehension predicated on a misreading of the statute. The essential difference between defined-contribution plans, such as the popular 401(k) plans offered by many private employers, and defined-benefit plans, such as the pension plan at issue here, is that in the former case all the risks and rewards of the investment of the funds fall on the employee-participant. In defined-benefit plans, these roles are reversed. If the investments go sour, the employer must contribute whatever is required to deliver the promised benefit to the employee at retirement. Conversely,

[5] *See Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1189-90 (7th Cir. 1994); *Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia v. General Elec. Co.*, 23 F.3d 828, 831-33 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994).

a successful investment strategy might lighten and even eliminate for varying periods of time the need for employer contributions. As Judge Easterbrook explained in *Johnson*:

> . . . the retirees do not own the assets of a defined-benefit pension plan. Their contributions purchased not a pool of assets (as would be the case with a defined-contribution plan) but a promise of benefits. 29 U.S.C. § 1002(34). Employees who contribute to a defined-benefit plan are in this respect like persons who purchase annuity contracts from insurance companies. They obtain a guaranteed stream of payments; the insurer (or, with pension plans, the employer) bears the investment risk.

19 F.3d at 1186.

Thus, when a retiree receiving benefits under a defined-benefit plan dies, the retiree's estate receives nothing from the plan, unless the plan itself promises a death benefit. This result cannot be reconciled with the court of appeals' notion of a "vested interest" in all the earnings generated within a defined-benefit plan from an employee's contributions.

The court of appeals' conception of "plan surplus" is irreconcilably in conflict with the view of other circuit courts. Again, *Johnson* is instructive:

> . . . the "surplus" of a defined-benefit plan is . . . not a pile of assets stacked in the corner. It is instead an accounting construct. The plan determines the value of its assets — stocks, bonds, real property, cash, and so on. It also estimates the cost of fulfilling all of the promises to pay vested benefits. The former computation yields the asset side of the balance sheet, the latter computation the liability side. The difference between these is the "surplus" or "deficit" (depending on whether

the number is positive or negative), which appears on the debit side of the balance sheet to make the two columns tally. Section 1002(21)(A)(i), in conjunction with §§ 1104 and 1106, requires trustees and other persons to deal with the assets of the plan in circumspect and prudent ways. It has nothing at all to say about the debit column on the balance sheet . . ..

Id. at 1189.[6]

The Ninth Circuit's contrary conclusion rests on two narrow statutory provisions that do not alter the general rule that participants in defined-benefit plans have no protected interest in plan assets beyond the right to receive payment of their vested benefits.

The first of these exceptions is the minimum vesting or nonforfeiture provisions of ERISA Sections 203-04, 29 U.S.C. §§ 1053-54 (1994). Far from giving participants a vested interest in all of the earnings attributable to their contributions, these provisions provide only for nonforfeitability of the benefits derived from the contributions themselves plus specified levels of imputed annual interest on employee contributions. *See* 29 U.S.C. § 1054(c)(2)(B)-(C)(1994). The amount of interest imputed to the contributions is fixed by law, and is wholly unrelated to the successes or the failures of the plan's investment strategies. Thus, the minimum vesting requirements do not create a vested interest in the earnings attributable to employee contributions, but merely result in an increase in accrued plan

[6] Among other variables driving plan "surplus" is the accuracy of the actuarial projections. If plan assets appreciate more rapidly than the actuary predicted, "surplus" grows; if assets grow less quickly or shrink more rapidly than predicted, "surplus" declines.

liabilities — what the *Johnson* court refers to as "the debit column on the balance sheet" — and a corresponding *reduction* in plan "surplus."

The court of appeals also relied on ERISA Section 4044(d)(3)(A), 29 U.S.C. § 1344(d)(3)(A)(1994), which provides that, upon plan termination, if there are assets that are attributable to employee contributions remaining after satisfaction of all plan liabilities, those assets shall be "equitably distributed" to the contributing participants or their beneficiaries.

This highly contingent remainder interest was bootstrapped by the panel majority into a general ownership or beneficial interest in "surplus" no matter whether any termination of the plan has occurred or is contemplated. *See* Pet'r App. 9a. However, plan "surplus" may shrink to as little as zero or become a deficit for any number of reasons, including an unexpected increase in early retirements, retirees living longer than the actuaries predicted, interest rate fluctuations, and stock market corrections. When these events occur, as the court of appeals conceded, the employer has no obligation to make contributions in order to perpetuate the plan's "surplus." *Id.* at 6a (citing *Fetcher v. HMW Indus., Inc.*, 879 F.2d 1111, 1113 (3d Cir. 1989)). In short, participants in a defined-benefit plan have no right under ERISA to insist on perpetuation of a "surplus," even when their contributions account in some measure for that "surplus." That being so, reducing "surplus" by means of plan amendments that provide additional benefits, whether to existing or new participants, or that reduce employee funding obligations, cannot violate ERISA.

Many retirees would no doubt like to have plan "surplus" perpetuated, whether attributable to employee or employer contributions, as that would give them an extra margin of

protection against the possibility of the employer becoming unable to fund the plan. Many other retirees, however, might favor amending the plan to increase payments to retirees, thereby reducing "surplus." But many active employees would no doubt regard a new benefit, such as a special early retirement "window," as a better use of plan assets. Employers would prefer the freedom to add new benefits or to increase existing benefits in whatever manner best serves the employer's interests. An employer might be inclined, for example, to eliminate required contributions by employees if the employer thought that such a step would make the company a more attractive place to work in the eyes of prospective new employees.

As *Lockheed* teaches, on these issues Congress concluded that employers acting in their capacities as plan settlors, not as fiduciaries, can make the decision. And, as an *en banc* Ninth Circuit decision in another case points out, resolution of conflicting policies and interests is

> best left to Congress — particularly when the conflicting concerns and interests arise in an area of the law Congress has chosen to regulate with painstaking detail. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L. Ed. 2d 354 (1980) (ERISA is a "comprehensive and reticulated statute").

Hughes Salaried Retirees Action Comm. v. Administrator of Hughes Non-Bargaining Retirement Plan, 72 F.3d 686, 695 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996). Because the opinion of the court of appeals ignored this admonition, and created duties and obligations that are not found in ERISA, *certiorari* should be granted.

III. THE HOLDING OF THE COURT OF APPEALS, THAT PLANS MAY BE DEEMED TO BE TERMINATED WHENEVER A DISTRICT COURT CONCLUDES AS A MATTER OF FACT, BASED ON COMMON LAW TRUST CONCEPTS, THAT TERMINATION HAS OCCURRED, IS ALSO INCONSISTENT WITH THE RULINGS OF OTHER CIRCUIT COURTS AND THREATENS SERIOUSLY TO DISRUPT THE MANAGEMENT OF NUMEROUS PENSION PLANS.

The court of appeals held that the district court could conclude as a matter of fact, based on the common law of trusts, that Hughes' amendments to the plan had caused a "termination" of the plan. *See* Pet'r App. 10a-12a, 22a-23a. This holding is contrary to the law of the Third, Fourth, and Fifth Circuits, where the concept that pension plans can be terminated outside ERISA's statutory framework has been squarely rejected. *See American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995); *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990); *In re Esco Mfg. Co.*, 50 F.3d 315, 316 (5th Cir. 1995) (citation omitted).

Plan termination is a topic that Congress has addressed in painstaking detail in ERISA. *See* ERISA Sections 4041-48, 29 U.S.C. §§ 1341-48 (1994). The key termination provision in this highly detailed regulatory scheme reads:

> (1) Exclusive means of plan termination
>
> Except in the case of a termination for which proceedings are otherwise instituted by the [Pension Benefit Guaranty C]orporation as provided in section 4042 of this title, a single-employer plan may be terminated only in a

standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

ERISA Section 4041(a)(1), 29 U.S.C. § 1341(a)(1)(1994).

Ignoring all but section 4044 of the statutory scheme, and relying on (1) a *superseded* tax regulation,[7] *see* Pet'r App. 11a n.3, and (2) an aberrant district court decision from the Fifth Circuit (which in turn relied on common law trust principles), *see id.* at 9a, the court of appeals held that Hughes may have "in effect, terminated" the plan or that its conduct may have amounted to a "constructive termination" of the plan, *see id.* at 10a, 11a n.3. As the court of appeals saw it, whether amending a retirement plan to add a new benefit formula amounts to "constructive" termination is a factual issue to be resolved only after discovery. *See id.* at 11a n.3, 22a-23a.

Yet there is nothing in the complaint or in the court of appeals' opinion to suggest that the Hughes amendment was any different from the type of plan amendment that thousands of employers routinely have adopted to alter, and typically to improve, plan benefits for participants. There appears to be

[7] *Compare* 26 C.F.R. § 1.411(d)-2(c) *with* 26 C.F.R. § 1.401-6(b)(1); *see also* Rev. Rul. 89-87, 1989-2 C.B. 81. The court of appeals' reliance on the tax-law concept of a "partial termination" is likewise badly mistaken. Events or developments that will amount to a termination or a "partial termination" for tax law purposes do not by themselves constitute or require a termination for purposes of ERISA. *See, e.g.*, ERISA Section 4043(c)(4), 29 U.S.C. § 1343(c)(4) (1994); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1516 (10th Cir. 1996); *Chait* v. *Bernstein*, 835 F.2d 1017, 1020-21 (3d Cir. 1987); *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1299 (3d Cir. 1983); *Baum v. Nolan*, 853 F.2d 1071, 1076-77 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

no dispute that many active employees elected to continue making contributions in order to qualify for the older and more generous benefit formula. There are only conclusory allegations that "in effect" two plans were created and that the amendment was "equivalent" to a termination. Such allegations are simply artful pleading tactics designed to mask as a factual issue what in reality is a legal claim.

Employers commonly improve pension benefits for their employees by adding a separate benefit formula to the plan. In many cases, benefits are calculated separately for each employee under the several formulas in the plan, with the employee receiving benefits under the formula that produces the greatest benefit for that individual. But it is also a common practice, as was done here, to extend to new or future employees only the newly adopted benefit formula. If employers must run the risk on a case-by-case basis of having a court find as a factual matter that adoption of a new benefit formula somehow terminates a plan, possibly with very serious adverse tax consequences for both the employer and its employees, a very substantial and quite unnecessary obstacle will be placed in the path of improved employee benefits.

The court of appeals' suggestion that when a plan amendment limits a pre-existing benefit formula to current participants and applies a new formula to future participants, the amendment may amount to a "constructive termination" of the plan, *see* Pet'r App. 11a n.3, has very troubling implications that extend well beyond the immediate context of contributory defined-benefit plans. The notion that "freezing" or limiting an existing benefit formula to current participants is a "constructive" termination could mean, for example, that the Pension Benefit Guaranty Corporation would be required to assume many billions of dollars in additional termination liabilities for underfunded plans. *Cf. United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir.

1983). These uncertainties and potential serious consequences for plan beneficiaries, employers and the public generally are the result of the court of appeals' disregarding the specifics of the statutory scheme and "borrowing" from tax and from common law concepts to find support for its holdings.

This Court repeatedly has cautioned that "[t]he authority of the courts to develop a 'federal common law' under ERISA . . . is not the authority to revise the text of the statute," and that, particularly in the context of a very detailed and highly complex statute such as ERISA, "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text. . . ." *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 259, 261 (1993), *aff'g* 948 F.2d 607 (9th Cir. 1991); *see also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Unfortunately, by its reliance on just such vague notions, the court of appeals has reached a result that can only produce great confusion and uncertainty unless and until it is overturned.

CONCLUSION

For the foregoing reasons, ERIC urges the Court to grant the Petition for Writ of Certiorari.

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March 24, 1998

MOTION

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No. 97-1287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN
Petitioners,
VS.
STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,
Respondents.

On Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND *AMICI CURIAE* BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION IN SUPPORT OF PETITIONERS

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On Petition for Writ of Certiorari to
The United States Court of Appeals for the Ninth Circuit

MOTION OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Hughes Aircraft Retirees Association ("HARA") and the Hughes Employees Association ("HEA") respectfully move this Court for leave to file the attached Brief as amici curiae in support of the Petition for Writ of Certiorari ("Petition") filed by Petitioners, Hughes Aircraft Company ("Hughes") and Hughes Non-Bargaining Retirement Plan (the "Plan").[1]

---

[1] Pursuant to Supreme Court Rule 37.6, this Motion and Brief were authored in their entirety by attorneys at O'Melveny & Myers LLP, counsel for HARA and HEA. HARA and HEA were the only persons or entities who made a monetary contribution to the preparation and submission of this Motion and Brief.

The consent of the attorney for the Petitioners has been obtained and is filed concurrently herewith. The consent of the attorney for the Respondents was requested, but refused.

NATURE OF THE INTEREST OF THE AMICI CURIAE

A. Hughes Employees Association -- HEA was incorporated as a non-profit California corporation in 1953. Membership in HEA is extended to all employees of Hughes and to all Department of Defense employees assigned to work at locations within Hughes' California facilities. HEA receives funding from Hughes to carry out its purposes of promoting social, welfare, educational and recreational activities of Hughes' employees. HEA members (other than Department of Defense employees) are participants in the Plan.

HEA's opposition to the Ninth Circuit's Jacobson decision is hardly unexpected. Judge Norris' dissent refers to the "serious adverse consequences" that the majority's decision will have upon the current participants in the Plan. See Petition at 48a. Either plan termination or the inability to use Plan assets to fund the noncontributory feature of the Plan would work a substantial hardship on HEA's members. For these reasons, HEA opposes the Ninth Circuit's decision in its entirety.

B. Hughes Aircraft Retirees Association -- HARA represents Hughes' retirees. It was formed in 1986 as a non-profit organization by Hughes' retirees. HARA's goals are to provide an educational and social forum for Hughes' retirees and to provide them with an opportunity to participate in group activities and community service. From its initial base of less than 20 members, HARA has grown to a membership of over 900 Hughes' retirees, residing primarily in Southern California,

but also elsewhere. Although HARA is recognized as an organization by Hughes, it is an independent retiree organization operating under its own bylaws and governed by a 26 person volunteer board of directors.

HARA's participation in this Brief may seem surprising because the five Respondents have asserted, and convinced the Ninth Circuit, that the retirees would favor the results in the majority opinion. This is not the case. The HARA Board has thoroughly reviewed this matter and concluded that the Ninth Circuit's opinion will, on balance, make retirees worse off. How HARA reached this conclusion is explained in the Brief.

Because it is important that the Supreme Court approach this case without illusions as to the consequences of this matter on the current employees who participate in the Plan and on retirees under the Plan, amici curiae HEA and HARA move this Court for leave to file the attached Brief.

DATED: March 27, 1998.

Respectfully submitted,

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AMICI CURIAE BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION

NATURE OF THE INTEREST OF THE AMICI CURIAE

Hughes Aircraft Retirees Association ("HARA") and the Hughes Employees Association ("HEA") adopt the statements made in the Motion for Leave to File Brief, immediately preceding this Brief, as the description of the interests of the amici curiae.

ARGUMENT

I. THE NINTH CIRCUIT ERRED IN ITS ANALYSIS OF THE RETIREMENT PLAN'S ALLEGED TERMINATION.

A. The Termination Of The Plan And Distribution Of Plan Assets Will Have A Detrimental Effect On HARA And HEA Members.

It is obvious why current employees are severely harmed by a holding that the Plan has been terminated. What may be less obvious, however, is why current retirees, the class supposedly benefited by the Ninth Circuit's decision, will be harmed if the Ninth Circuit's misreading of the law is not remedied. In fact, however, HARA's members are harmed by Respondents' attempt to treat the Plan as terminated as of January 1, 1991 (Complaint ¶ 42, Petition at 141a) and to require immediate distribution of all Plan assets (Complaint ¶ 56, Petition at 143a). While a termination may, at first, appear beneficial to Hughes' retirees, the only persons certain to gain from this outcome are Respondents' lawyers. This portion of the Brief explains why a termination decision harms Hughes' retirees. [While the arguments set forth below apply with equal force to Hughes' active employees, for ease of explanation, this portion of the Brief will refer to HARA and the Hughes' retirees.]

The singular disadvantage of plan termination is that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq., ("ERISA") generally requires that all plan assets be distributed in the form of annuity contracts. ERISA

§ 4041(b)(2)(D), 29 U.S.C. § 1341(b)(3); 29 C.F.R. § 4041.3. This has several consequences:

Although the contributory feature of the Plan generally contains a cost-of-living adjustment (see Plan § 4.13-A, App. B), the Plan provides that, in the event of its termination, cost-of-living increases are only available to participants who have already retired as of the date of termination. See Plan § 4.13-A(c), App. B. The cost-of-living feature would thus be lost for the thousands of persons who retired after 1990.

Second, a termination will cause all retirees to lose the possibility of any future pension increases that might otherwise be financed from the surplus. For example, the Plan's cost-of-living adjustment feature is limited to a 4% annual increase (see Plan § 4.13-A, App. B). The only source of protection for inflation increases in excess of 4% would be in the form of ad hoc amendments by Hughes financed from the surplus. But no such surplus will exist if all plan assets are distributed.

There is an even more fundamental problem. The distribution of annuity contracts on plan termination relieves the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency that otherwise guarantees benefits, from what otherwise would be its obligation to stand behind Hughes' pension promises. PBGC Op. No. 91-1 ("the statute does not authorize PBGC to guarantee benefits distributed in the form of irrevocable annuity contracts from insurance companies."), 1991 Westlaw 80739 at *1 (P.B.G.C.), Pens. Plan Guide (CCH) ¶ 23,824. In light of the well-known insolvencies of Executive Life Insurance Company and Mutual Benefit Life Insurance Company (both of which were highly rated until shortly before their insolvencies), HARA understandably prefers the greater

safety of an unterminated plan with PBGC protection. This provides both the safety margin of today's surplus and, if the plan is later terminated, a federal-agency guarantee.

The HARA Board carefully considered the possibility that the decreased security and loss of potential pension increases would be offset by Respondents' hoped-for increase in pension benefits upon plan termination. The possibility of any such increase, however, may prove illusory.

For example, while Respondents assert that the entire surplus belongs to them, Hughes will not agree. Using Respondents' own estimates of employee and employer contributions (Complaint ¶ 21, Petition at 135a-136a), it would appear that at least 60 percent of the surplus could be claimed by Hughes, leaving only 40 percent available to be split between Hughes' retirees and employees.[2] HARA further estimates that, based on the 1995 actuarial report for the Plan by the independent actuarial firm of Towers Perrin, retirees would be entitled to about 70 percent of the surplus not claimed by Hughes, and active employees would be entitled to the remaining 30 percent of the surplus not claimed by Hughes. (This 70/30

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[2] ERISA generally provides that any available surplus is allocated between the value of employer and employee contributions. See ERISA § 4044(d), 29 U.S.C. §1344(d). HARA developed its estimates of these two amounts by increasing the contributions set forth in Complaint ¶ 21 (Petition at 135a-136a) by eight percent interest and comparing the total value of employer and employee contributions as of December 31, 1990. This inexact method is, of course, no substitute for the actual calculations that would be required in order to divide the surplus. Nevertheless, it was necessary for HARA to undertake some type of estimating process to assess the impact of Jacobson on its members.

split is based on the relative value of benefits allocable to each two groups.) As a result, the $1.2 billion surplus at December 31, 1990 (Complaint ¶ 23, Petition at 136a) may only result in $336 million being available for retirees (70% of 40% of $1.2 billion equals $336 million) -- an increase far less valuable to HARA than the security for benefits provided by the surplus.

What has not been mentioned in the lawsuit at this point, as it could not be at the pleading stage, is the fact that the Department of Defense, which has been Hughes' largest customer for many of the years in question, can be expected to assert a claim to a substantial portion of any pension surplus, as it generally does when a company that has derived revenue from government contracts terminates an overfunded pension plan.[3] Although the effect of such a claim is uncertain at this time, it could result in a further reduction of surplus.[4]

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[3] 48 C.F.R. § 31.205-6(j)(4) provides in pertinent part:

> Termination of defined benefit pension plans. When excess or surplus assets revert to the contractor as a result of termination of a defined benefit pension plan, or such assets are constructively received by it for any reason, the contractor shall make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn....

[4] Exactly how the regulations governing the allowance of pension costs in government contracts apply will vary depending on the nature of each individual contract. Moreover, the way any such claim would be treated in a case like this one, where a court rules that a termination occurred (rather than a situation where a company voluntarily terminates its plan to recover surplus) is unknown. Therefore, it is difficult to say exactly how any such claim would affect the size of the plan surplus. Nevertheless, we note that government

(continued...)

In sum, the 1995 actuarial report by Towers Perrin states that the present value of retirement benefits at that time was $2.55 billion. When one measures this amount against the portion of the surplus that Hughes' retirees might actually receive, HARA concludes that the potential benefit increase might amount to no more than 5 or 10 percent and, for the reasons described above, might be much less. This potential increase is not worth giving up the additional security provided by a PBGC guarantee, possible future ad hoc pension increases similar to those Hughes has granted in the past, and, for some retirees, the promise of cost-of-living pension increases.

B. The Ninth Circuit's Opinion Is Wrong.

HARA and HEA submit that, as a matter of law, no plan termination has occurred. In this regard, HARA and HEA adopt and fully agree with the arguments in Part III of the Petition for Writ of Certiorari ("Petition").

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[4](...continued)
contractors generally may only include as a pension cost the cost of pension benefits as provided for in the benefit plan that is in effect at the time of the contract. 48 C.F.R. § 9904.412-50(b)(5) ("Pension cost shall be based on provisions of existing pension plans. . . ."); 48 C.F.R. § 9904.412-60(b)(3) ("in calculating pension costs, the contractor may not assume future benefits greater than that currently required by the plan"). This could potentially allow the government to claim the whole surplus to the extent it exceeds the benefits provided by the plan formula that existed at the time of the government contracts.

II. THE PLAN HAS BEEN AND REMAINS ONE PLAN.

In their Petition, Petitioners note that the Ninth Circuit also erred in finding that the addition of the non-contributory benefit structure to the existing Plan on January 1, 1991, created two distinct plans, even though all benefits continue to be paid from a single trust fund. See Petition at 20 n.6. HEA supports, and herein more fully develops, the argument that the Plan constitutes one plan -- both before and after the January 1, 1991 amendment -- within the meaning of ERISA.

Respondents' First, Second, Third, and Fifth Causes of Action fundamentally rest on one erroneous legal conclusion -- that two separate plans were created as of January 1, 1991. Based on this mistaken underpinning, Respondents then allege that the use of the assets in what they call the Contributory Plan to fund benefits under what they call the Non-Contributory Plan violates ERISA.[5] In each Cause of Action, however,

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[5] Specifically, Respondents allege violations of ERISA §§ 403(c)(1), 404(a)(1)(A)&(B), 203(a), and 406(a)(1)(D). 29 U.S.C. §§ 1103(c)(1), 1104(a)(1)(A)&(B), 1053(a), and 1106(a)(1)(D). These sections provide, respectively, that: (1) plan assets cannot inure to the benefit of any employer; (2) a fiduciary must act for the exclusive purpose of providing benefits to participants and their beneficiaries and with the care, skill, prudence, and diligence of a prudent person; (3) an employee must be 100 percent vested in the benefits attributable to his or her contributions; and (4) plan assets cannot be transferred to or used by or for the benefit of a party in interest.

Respondents' allegation that Hughes benefited by the amendment rests on the notion that the Plan is really two plans, so that the alleged transfer of plan assets to the Non-Contributory Plan

(continued...)

R spondents' linchpin assumption -- which is legally untenable -- is that two plans now exist.

Section 1.01 of the Trust obligates the Trustee to make payments from the Trust Fund in accord with trust and plan provisions. See App. A.[6] No provision of the Plan or the Trust requires or provides for separate segregation of assets attributable to the contributory feature and the non-contributory

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[5](...continued)
represents the inurement of plan assets to the benefit of the employer (the § 403(c)(1) cause of action) and represents the transfer to, or use by or for, the benefit of a party in interest of plan assets (the § 406(a)(1)(D) cause of action). This same alleged transfer also is asserted to violate ERISA's fiduciary-duty rules (the § 404(a)(1)(A)&(B) cause of action) and to violate § 203(a) because it results in a potential forfeiture of benefits attributable to employee contributions.

Respondents' claims that Hughes benefited from the Plan amendment contrast with Lockheed Corp. v. Spink, ___ U.S. ___, 116 S. Ct. 1783 (1996). Respondents do not allege, for instance, that Hughes received anything in return from Plan participants in exchange for the Plan amendment at issue. In Spink, by contrast, the participant's ability to receive a higher retirement benefit was conditioned upon his release of any employment-related claims against the employer. Thus, Spink alleged that Lockheed benefited directly from the plan amendment.

[6] For the Court's convenience, Appendix A contains Section 1.01 of the Trust Agreement pursuant to Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan, which is properly before the Court at pages 73-75 of Appellants' Excerpts of Record. Similarly, Appendix B contains Section 4.13-A, Cost of Living Adjustment, Hughes Non-Bargaining Retirement Plan, which is properly before the Court at page 339 of Appellants' Excerpts of Record.

feature. Thus, all of the assets of the Trust are available to pay any claim arising under the Plan.

As a matter of law, therefore, there was only, and remains only, one Plan because (1) it is undisputed that all assets under the Trust are available to pay benefits, and (2) the exclusive test for determining how many plans exist under ERISA is the availability of Trust assets to pay Plan benefits. Under these circumstances, the Department of Treasury, the Department of Labor, and the PBGC uniformly agree that only one plan exists.

The Treasury Regulations at 26 C.F.R. § 1.414(l)-1(b)(1) are dispositive of the single plan versus multiple plan question.[7] Treasury Regulation § 1.414(l)-1(b)(1) defines a single plan by stating:

> [A] plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. A plan will not fail to be a single plan merely because . . . the plan has several distinct benefit structures which apply either to the same or different participants.

This same Treasury Department regulation also determines when a single plan exists for purposes of Title I of

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[7] 26 U.S.C. § 414(l) contains the rules concerning the circumstances under which tax-qualified plans (i.e., plans described in 26 U.S.C. § 401(a)) can merge, split, or transfer plan assets. A necessary component of this statutory directive is a determination of how many plans are involved.

ERISA, 29 U.S.C. §§ 1001-1191c. See Malia v. General Electric, 23 F.3d 828, 832 n.4 (3d Cir.), cert. denied, 513 U.S. 956 (1994).[8] Respondents' First, Second, Third, and Fifth Causes of Action all allege violations of statutes that comprise part of Title I of ERISA.

Thus, for both tax-qualification and ERISA matters, the Plan clearly meets the Treasury Department's definition of a "single plan." All of the Plan's assets "are available to pay benefits to employees who are covered" by the Plan. Moreover, according to the Treasury Department's regulations, simply because the Plan "has several distinct benefit structures" does not cause the Plan not to be a single plan. Therefore, the contributory and non-contributory features of the Plan simply are two features of a single plan.

Regulations issued by the Department of Labor confirm that the creation of differing plan features does not result in the

[8] The ERISA Reorganization Plan establishes that this definition applies both to the tax-qualification rules found in the Internal Revenue Code and to the substantive provisions of ERISA. See Reorganization Plan No. 4 of 1978, *reprinted in* 1978 U.S.C.C.A.N. 9815 (the "ERISA Reorganization Plan"). Many of the provisions of ERISA found in the Labor Code, i.e., 29 U.S.C. §§ 1001 et. seq. also are contained in the Internal Revenue Code. The ERISA Reorganization Plan allocates regulatory authority between the Secretaries of Treasury and Labor. Section 101(a) of the ERISA Reorganization Plan transfers to the Secretary of Treasury all authority to issue regulations, rulings, opinions, variances and waivers under Parts 2 and 3 of subtitle (b) ERISA § 208, 29 U.S.C. § 1058, which contains language essentially identical to 26 U.S.C. § 414(l), is found in Part 2 of subtitle (b) of Title I. Accordingly, Treas. Reg. § 1.414(l)-1 is applicable to Title I of ERISA. See Malia v. General Electric, 23 F.3d 828, 832 n.4 (3d Cir.), cert. denied, 513 U.S. 956 (1994).

creation of separate plans. For instance, ERISA § 102, 29 U.S.C. § 1022, requires that summary plan descriptions be proposed for employee benefit plans. The regulations governing summary plan descriptions clearly contemplate the inclusion in one plan of different benefit features. The Department of Labor's regulations provide in pertinent part:

> In some cases an employee benefit plan may provide different benefits for various classes of participants and beneficiaries. For example, a plan amendment altering benefits may apply to only those participants who are employees of an employer when the amendment is adopted and to employees who later become participants, but not to participants who no longer are employees when the amendment is adopted. (See § 2520.104b-4.) Similarly, a plan may provide for different benefits for participants employed at different plants of the employer, or for different classes of participants in the same plant. . . .

29 C.F.R. § 2520.201-4 (emphasis added).

That the determination of how many plans are involved hinges on the availability of Trust assets is confirmed by the fact that the third administrative agency concerned with ERISA, the PBGC, also has adopted the definition of "plan" from ERISA Title I. Specifically, the relevant PBGC regulations (29 C.F.R. § 4001.2) refer to the definition of a defined benefit plan in Title I of ERISA at ERISA § 3(35), 29 U.S.C. § 1002(35). Since Treasury Regulation § 1.414(l)-1 applies to Title I (see supra n.7), the PBGC's definition of "plan" also compels the conclusion that a single plan exists.

This approach to the determination of when a single plan exists is consistent with the Supreme Court's direction that courts look to ordinary trust law for aid in construing terms in ERISA. See Varity Corp. v. Howe, 516 U.S. 489 (1996); Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 110-11 (1989). Traditional trust law has never required that a separate trust be established for each different sort of benefit promised to beneficiaries. For example, it is commonplace for a family trust to provide a life estate in property to one beneficiary, a remainder interest to another beneficiary, and an income stream for support to yet another beneficiary. Similarly, traditional trusts frequently provide different benefits to different classes of beneficiaries. Such a structure in no way suggests that separate trusts are created. See II Fratcher, Scott on Trusts § 113 ("The most usual type of trust . . . is one in which there are two or more beneficiaries entitled to the enjoyment of the trust property in succession; as, for example, where it is the duty of the trustee to pay the income to a beneficiary for life, and on his death to convey the trust property to other beneficiaries."); see also 1 Restatement of Trusts 2d § 113, comment b ("The interests of several beneficiaries may be enjoyable simultaneously or successively").

In sum, HEA believes that there is much logic in this approach to determining whether one or multiple plans are involved. Because of a desire to change benefit structures over time or to provide different benefits for different corporate operations, it is a common fact of corporate life that large plans have nonuniform benefit structures. To treat any such difference as a separate plan would lead to hopeless complexities under ERISA because the ERISA reporting and disclosure, funding, and fiduciary-responsibility requirements all are defined on a plan-by-plan basis.

In this case, therefore, one pension plan exists. The suggestion of the Ninth Circuit that, at least under certain circumstances, multiple plans exist for purposes of ERISA even when all trust assets are available to pay all benefits would spread confusion throughout the appellate circuits and is inconsistent with the existing case law and regulations. Both employers and employees would be at sea as to what new rules would apply.

CONCLUSION

For the foregoing reasons, Hughes Aircraft Retirees Association and Hughes Employees Association respectfully submit that this case presents a substantial federal question for this Court's review, that the decision below conflicts with this Court's holding in Lockheed v. Spink, ___ U.S. ___, 116 S. Ct. 1783 (1996), and with other circuit courts' authority, and that, accordingly, this Court should grant the Petition for Writ of Certiorari, and either summarily reverse the judgment below or set the case for plenary review.

DATED: March 27, 1998.

Respectfully submitted,

David E. Gordon

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APPENDIX

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APPENDIX A

SECTION 1.01 OF THE TRUST AGREEMENT PURSUANT TO HUGHES NON-BARGAINING RETIREMENT PLAN AND HUGHES BARGAINING RETIREMENT PLAN

Section 1.01 of the Trust Agreement, as restated in the Sixth Amendment to the Trust Agreement, states:

> It shall be the duty of the Trustee to receive funds for and to hold the Trust Fund (as defined below); to manage, invest, and reinvest the Trust Fund, except as provided in Section 1.03(d); to collect and hold the increase, earnings, and profits thereon; and to make payments from the Trust Fund; all as herein and in the Plan provided. "Trust Fund" herein shall mean all cash and other property contributed, paid or delivered to the Trustee hereunder, all investments made therewith and proceeds thereof and all earnings and profits thereon, less payments, transfers or other distributions which, at the time of reference, shall have been made by the Trustee, as authorized herein. The Trust Fund shall include all evidences of ownership, interest or participation in an Investment Vehicle, but shall not, solely by reason of the Trust Fund's investment therein, be deemed to include any assets of such Investment Vehicle.

APPENDIX B

SECTION 4.13-A, COST OF LIVING ADJUSTMENT, HUGHES NON-BARGAINING RETIREMENT PLAN

Section 4.13-A of the Hughes Non-Bargaining Retirement Plan, entitled "Cost of Living Adjustment," states:

> (a) The monthly Benefit payable under Section 4.2-A(a)(i) of the Normal Retirement Benefit, 4.7-A(a)(i) of the Early Retirement Benefit or 4.9-A(a)(i) of the Late Retirement Benefit or in respect of a Participant during any Plan Year (the "subject Plan Year") after the first Plan Year in which monthly Benefits were so payable shall be adjusted by multiplying the monthly Benefit so payable during the Plan Year immediately preceding the subject Plan Year (after applying the Cost of Living Adjustment to such preceding Plan Year) by a factor (not over 1.040 and not under 0.960) computed to at least three decimal places, determined by dividing:
>
> > (i) the United States Bureau of Labor Statistics Consumer Price Index (All Urban Consumers, all items, United States city average, 1967 = 100) as revised, for the September next before the subject Plan Year
> >
> > by

(ii) such Index for the September of the second year before the subject Plan Year.

(b) Notwithstanding the provisions of subsection (a), the adjustment provided in such subsection shall not result in a monthly Benefit less than the monthly Benefit initially payable to or in respect of the Participant.

(c) If the Plan is terminated under Section 6.1, no further adjustments shall be made under this Section, except as to Former Participants who had retired under a Normal Retirement Benefit, Early Retirement on or after his fifty-fifth (55th) birthday or Late Retirement Benefit (but not if his Separation from the Service was prior to being Vested) on or prior to the date of such termination.

(d) No adjustment shall be made under this Section to a Benefit payment payable in a lump sum on the death of a Participant as described in Section 4.2-A(a)(ii) of the Normal Retirement Benefit.

No. 97-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND
HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E.
MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 5, 1998
CERTIORARI GRANTED APRIL 27, 1998

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The following opinions, orders, and documents have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

UNITED STATES DISTRICT COURTS
FOR THE DISTRICT OF ARIZONA AND
THE CENTRAL DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

**CIVIL DOCKET FOR CASE NOS.
CIV-92-031 & CV-92-4020**

Date	No.	PROCEEDINGS
1/21/92	1	COMPLAINT filed.
		* * * *
2/20/92	5	MOTION to transfer case by Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan [5-1].
		* * * *
3/10/92	8	MEMORANDUM in opposition by plaintiff to motion to transfer case by Hughes Aircraft Company and

Date	No.	PROCEEDINGS
		Hughes Non-Bargaining Retirement Plan [5-1].
		* * * *
3/13/92	10	MOTION to dismiss by defendant [10-1], or, alternatively, for more definite statement by defendant [10-2], and to strike portions of complaint by defendant [10-3].
3/13/92	11	DECLARATION by defendant regarding motion to dismiss by defendant [10-1], motion for more definite statement by defendant [10-2], and motion to strike portions of complaint by defendant [10-3].
		* * * *
3/20/92	14	REPLY MEMORANDUM in support of motion to transfer case by Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan [5-1].
		* * * *
4/3/92	17	DEMAND for jury trial by plaintiff.
		* * * *
4/17/92	19	MEMORANDUM in opposition by plaintiff to motion to dismiss by defendant [10-1].

Date	No.	PROCEEDINGS
		* * * *
5/7/92	22	REPLY MEMORANDUM by Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan in support of motion to dismiss by defendant [10-1], motion for more definite statement by defendant [10-2], and motion to strike portions of complaint by defendant [10-3].
5/7/92	23	SUPPLEMENTAL DECLARATION regarding motion to dismiss by defendant [10-1], motion for more definite statement by defendant [10-2], and motion to strike portions of complaint by defendant [10-3].
5/18/92	24	MOTION to strike declarations by plaintiff [24-1].
		* * * *
6/8/92	26	MINUTE ENTRY Judge Initials: (JMR). Court Reporter: Chris Wright. Hearing: MOTION TO DISMISS/ MOTION TO TRANSFER ORDER taking under advisement on 6/8/92 the motion to dismiss by defendant [10-1], and motion to transfer case by Hughes Aircraft Company, Hughes Non-Bargaining Retirement Plan [5-1]. FURTHER ORDERED counsel to file additional

Date	No.	PROCEEDINGS
		briefs regarding motion to dismiss by 06/10/92 (cc: all counsel).

* * * *

Date	No.	PROCEEDINGS
6/10/92	28	SUPPLEMENTAL BRIEF filed by Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan regarding motion to dismiss by defendant [10-1].
6/22/92	29	ORDER by Judge John M. Roll that this case is transferred to the Central District of California. Accordingly this court declines to rule on defendants' motion to dismiss. Case transferred to District of California, Central District (cc: all counsel).

* * * *

Date	No.	PROCEEDINGS
9/23/92	38	NOTICE OF MOTION and motion to dismiss or alternatively motion for a more definite statement and to strike portions of the complaint, returnable on 10/19/92 at 10 a.m. by defendants Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan.
9/23/92	39	MEMORANDUM of points and authorities in support of motion to dismiss or alternatively for a more definite statement and to strike by defendants Hughes Aircraft Company

Date	No.	PROCEEDINGS
		and Hughes Non-Bargaining Retirement Plan.
9/23/92	40	COPIES of Declarations of Ann L. Verhey and Bertha E. Garrison in support of motion to dismiss or alternatively for a more definite statement and to strike by defendants Hughes Aircraft Company and Hughes Non-Bargaining Retirement Plan.
10/19/92	41	MINUTE ORDER. Defendants' motion to dismiss, Court dismisses the action without prejudice -- defendant to prepare Order.
10/28/92	42	NOTICE OF MOTION and motion for relief from Order dismissing complaint: Declaration of Julius Mel Reich, Donna Moshay, and Christa Alejo, returnable on 12/7/92 at 10:00 a.m.
11/23/92	43	OPPOSITION to plaintiffs' motion for relief from order dismissing complaint.
11/30/92	44	REPLY in support of motion to be relieved from Order.

* * * *

Date	No.	PROCEEDINGS
12/17/92	47	REPLY memorandum in support of motion to dismiss or alternatively for a more definite statement and to strike.
		* * * *
2/9/93	48	ORDERED that defendants' motion to dismiss entire complaint and each cause of action therein, is granted without leave to plaintiffs to amend, that the entire action is dismissed on merits with prejudice, that defendants' motion for a more definite statement is deemed moot, and that defendants' motion to strike is deemed moot.
2/9/93	49	JUDGMENT AND ORDER that the complaint herein and each cause of action therein be dismissed without leave to amend, that the entire action be and hereby is dismissed on the merits with prejudice.
3/2/93	50	NOTICE OF APPEAL by plaintiffs Stanley I. Jacobson, Daniel Welsh, Robert McMillin, Ernest Blandin and Richard Hook to the Ninth Circuit Court of Appeals from District Court order and judgment entered 2/10/93. (cc: Jerome Tauber; Julius Mel Reich; Robert F. Walker; Leslie L. Abbott) Fee: paid.
		* * * *

Date	No.	PROCEEDINGS
11/19/97	55	NOTICE OF REASSIGNMENT of Case Upon Receipt of Mandate from the Ninth Circuit Court of Appeals. Case randomly reassigned to Judge Audrey B. Collins for all further proceedings. Case number now reads as CV90-4020 ABC (cc: all counsel).
11/19/97	56	CERTIFIED COPY of Appellate Court Order reversing and remanding the Decision of the District Court [Appeal 50-1]. Costs Taxed.
		* * * *
12/15/97	61	FIRST AMENDED COMPLAINT by plaintiffs; plaintiffs adding Richard E Hook, Roger Bilyeu, Beatrice A. Whyld, Bernard Winikur, Frank NMI Henderson, Richard D. Randall, Defendants Raytheon Company, Hughes Electronics, HE Holdings Inc., Hughes Defense, Hughes Electronics Non-Bargaining Retirement Plan, Hughes Defense Non-Bargaining Retirement Plan, Raytheon Non-Bargaining Retirement Plan; jury demand. Summons issued on first amended complaint.
		* * * *
1/20/98	64	ANSWER filed by defendant Hughes Non-Bargaining Retirement Plan, defendant Hughes Electronics,

Date	No.	PROCEEDINGS
		defendant Raytheon Company, defendant Raytheon Non-Bargaining Retirement Plan to first amended complaint [61-1]; jury demand.
2/19/98	65	NOTICE OF MOTION AND MOTION by plaintiffs for class certification; motion hearing set for 9:30 a.m. 4/6/98.
2/19/98	66	DECLARATION of Julius Mel Reich by plaintiffs in support of motion for class certification [65-1].
2/19/98	67	AFFIDAVIT of I. Philip Sipser by plaintiffs in support of motion for class certification [65-1].

* * * *

Date	No.	PROCEEDINGS
3/18/98	69	JOINT REPORT of early meeting of counsel filed. Estimated length of trial parties unable to make an estimate of time given preliminary nature of discussions; Agreement and Stipulation.
3/19/98	70	STIPULATION and ORDER by Judge Audrey B. Collins: It is hereby ordered that the time which defendants may respond to plaintiffs' first set of interrogatories to defendants and plaintiffs' first request to produce documents for copying and inspection is extended to and including 30 days

Date	No.	PROCEEDINGS
		after the date upon which the retirement plan defendants issue their final determination resolving plaintiffs' claims and that plaintiffs' motion for class certification previously set for hearing on 4/6/98 is off calendar [65-1].

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,

Plaintiffs-Appellants,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants-Appellees.

CIVIL DOCKET FOR CASE NO. 93-55392

Date	PROCEEDINGS
	* * * *
6/16/93	OPENING BRIEF and 15 copies filed by Appellants Richard E. Hook, Ernest O. Blandin, Robert E. McMillin, Daniel P. Welsh, Appellant Stanley I. Jacobson (Informal: no) 38 pages and five excerpts of record in volumes; served on 6/11/93.

Date	PROCEEDINGS
6/24/93	MOTION and deputy clerk order filed: (Deputy Clerk: lp) The appellant's motion to expedite this case is granted in part. This case shall be calendared as soon as practicable. (Motion received 6/17/93).

* * * *

8/13/93	BRIEF and 15 copies filed by appellees Hughes Non-Bargaining Retirement Plan and Hughes Aircraft Company. 50 page brief and 5 supplemental excerpts. Served on 8/13/93.

* * * *

9/13/93	REPLY BRIEF and 15 copies filed by Richard E. Hook and Ernest O. Blandin (Informal: no) 20 pages; served on 9/8/93.

* * * *

11/4/93	ARGUED AND SUBMITTED to Betty B. Fletcher, Harry Pregerson, and William A. Norris.
6/10/94	ADDITIONAL CITATIONS received from Robert Walker, Esq., counsel for appellees Hughes Aircraft Company, et al., letter dated June 9, 1994, served on 6/9/94.
8/5/94	ADDITIONAL CITATIONS received from Stanley I. Jacobson, served on 8/3/94.

Date	PROCEEDINGS
11/10/94	ADDITIONAL CITATIONS received from Hughes Non-Bargaining Retirement Plan, served on 11/9/94.
6/20/96	ORDER filed (Betty B. Fletcher, Harry Pregerson, and William A. Norris): The parties are ordered to file simultaneous supplemental briefs not to exceed 20 pages no later than 7/15/96 on how the Supreme Court's ERISA decisions . . . affect the outcome in this case.
7/12/96	SUPPLEMENTAL BRIEF of 10 pages and 15 copies filed by Appellant Stanley I. Jacobson, served on 7/11/96.
7/17/96	SUPPLEMENTAL BRIEF of 20 pages and 15 copies filed by Appellees (Hughes Non-Bargaining Retirement Plan and Hughes Aircraft Company); served on 7/15/96.

* * * *

1/23/97	OPINION filed: Reversed and Remanded (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Betty B. Fletcher; Harry Pregerson, author; William A. Norris, dissenting.) Filed and entered judgment.

* * * *

2/12/97	MOTION filed by appellants for injunction pending appeal pursuant to Fed. R. App. P. 8, served on 2/10/97.

Date	PROCEEDINGS

*   *   *   *

2/18/97 ORDER filed (Betty B. Fletcher, Harry Pregerson, William A. Norris): Appellees are ordered to file a brief in opposition to appellants' motion for an injunction pending appeal. The brief should not exceed 15 pages and should be filed by 2/19/97. Appellees should address the question whether this court should issue a preliminary injunction and how the proposed spin-off merger of Hughes with Raytheon will affect appellants' claims in this action. Appellants' reply brief of 10 pages is due 2/21/97.

2/19/97 SUPPLEMENTAL BRIEF of 15 pages filed by Appellees, served on 2/19/97.

2/20/97 PETITION for rehearing with suggestion for rehearing en banc of 15 pages and 40 copies filed by appellees, served on 2/20/97 (panel and all active judges).

*   *   *   *

3/7/97 ORDER filed (Betty B. Fletcher, Harry Pregerson, William A. Norris): In the circumstances presented to the court, appellants' motion for an injunction pending appeal is denied.

4/8/97 BRIEF of 13 pages and 40 copies filed by ERISA Industry Committee in support of

Date	PROCEEDINGS

appellees' petition for rehearing en banc; served on 2/19/97 (panel and all active judges).

4/8/97 BRIEF of 15 pages and 40 copies filed by Hughes Employees in support of appellees' petition for rehearing en banc; served on 2/19/97 (panel and all active judges).

4/8/97 BRIEF of 15 pages and 40 copies filed by Chamber of Commerce in support of appellees' petition for rehearing en banc; served on 2/20/97 (panel and all active judges).

4/8/97 BRIEF of 7 pages and 40 copies filed by Hughes Aircraft Retirees in support of appellees' petition for rehearing en banc; served on 2/19/97 (panel and all active judges).

4/8/97 BRIEF of 10 pages and 40 copies filed by Raytheon Company in support of appellees' petition for rehearing en banc; served on 2/20/97 (panel and all active judges).

4/8/97 BRIEF of 15 pages and 40 copies filed by Pension Benefit Guaranty Corporation in support of appellees' petition for rehearing en banc; served on 2/20/97 (panel and all active judges).

8/5/97 ORDER filed (Betty B. Fletcher, Harry Pregerson, William A. Norris): Appellants are requested to file a response to the petition for rehearing en banc within 20 days of the date of this order.

Date	PROCEEDINGS
	* * * *
9/5/97	RESPONSE opposing petition for en banc rehearing filed by Appellants Richard E. Hook, Ernest O. Blandin, Robert E. McMillin, Daniel P. Welsh and Stanley I. Jacobson, served 9/4/97 (panel and all active judges).
	* * * *
9/8/97	BRIEF of 15 pages and 40 copies filed by RCA and AT&T; served on 9/5/97 (panel and all active judges).
	* * * *
10/23/97	ORDER and amended opinion filed (Judges Betty B. Fletcher, Harry Pregerson, and William A. Norris) (Original opinion id:) denying petition for enbanc rehearing.
10/24/97	MOTION to reconsider denial of injunction pending appeal filed by appellants, served on 10/21/97.
	* * * *
10/29/97	RESPONSE opposing appellants' motion to reconsider order of the Court filed by Appellees Hughes Non-Bargaining Retirement Plan and Hughes Aircraft Company, served on 10/29/97.
10/31/97	ORDER filed (Betty B. Fletcher, Harry Pregerson): The motion for reconsideration of

Date	PROCEEDINGS
	the denial of the injunction is denied. We do this in light of Hughes' assurance that after the merger, the surviving entity is Hughes, and that it has expressly bound itself to assume all the liabilities that may be incurred by the defendants in this litigation.
	* * * *
11/5/97	MOTION to transfer consideration of attorneys' fees on appeal to district court filed by appellants, served on 11/3/97.
11/10/97	MANDATE ISSUED. Costs Taxed.
11/21/97	OBJECTIONS to request to transfer and request for attorneys' fees filed by appellees, served on 11/19/97.
11/26/97	ORDER filed (Betty B. Fletcher, Harry Pregerson, and William A. Norris): Appellant's motion for an order awarding fees on their successful appeal and directing the district court to determine the amount of fees, or in the alternative transferring consideration of fees on appeal to the district court is denied. . . . Accordingly, appellants' motion is denied.
12/2/97	MOTION for clarification of order amending opinion filed by Hughes Non-Bargaining Retirement Plan and Hughes Aircraft Company, served on 11/25/97.
	* * * *

Date	PROCEEDINGS
1/23/98	ORDER for publication filed (Betty B. Fletcher, Harry Pregerson, and William A. Norris): In response to the motion for clarification filed by defendants/appellees Hughes on 12/2/97, the order amending opinion and denying petition for rehearing, filed 10/23/97, is clarified and amended as follows: (see order for text).

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

COMPLAINT FOR ENFORCEMENT OF RIGHTS UNDER ERISA

Plaintiffs, by their undersigned attorneys, complain as follows:

NATURE OF THE ACTION

1. This is a class action for breach of statutory and fiduciary duties and to enforce the rights of pension plan participants arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 USC §§ 1001 et.seq. and under the terms of the plan. The Plaintiffs, retired participants in the defendant Hughes Non-Bargaining Retirement Plan (the "Plan"), seek an order and judgment declaring that they have a vested right to all or a portion of the excess Plan assets and requiring the Defendants to utilize all or a portion of such excess Plan assets to provide plaintiffs and

the class they represent with improved pension benefits, together with an award of attorney's fees and the costs of the action.

2. Plaintiffs and the class they represent, during the term of their active employment with Hughes, made periodic mandatory contributions to the Plan. Over the years, as a result of these employee and employer contributions and of investment growth earned by the contributions, a substantial surplus accumulated in the Plan, that is, the value of the Plan assets far exceeded the pension liabilities.

3. As a result of this accumulated excess Hughes, after being acquired by the General Motors Corporation, ceased making contributions to the Plan and has not made any contributions since 1986, utilizing excess Plan assets to meet its funding obligations. During the same period of time that Hughes made no contributions, participating active employees were required to continue to make contributions to the Plan and are required to continue to do so to date. Effective January 1, 1991, Hughes created a new non-contributory plan and terminated new enrollment in the contributory Plan.

4. Plaintiffs contend that the exclusive utilization of the excess pension assets by the defendants for their sole use and benefit is in violation of various provisions of ERISA and part of an unlawful plan to obtain for Hughes' own use, Plan assets belonging to and dedicated to the exclusive benefit of plaintiffs and the class they represent. Plaintiffs' further contend that the Plan was terminated on January 1, 1991, entitling the participants to an equitable distribution of the surplus assets in the form of improved benefits.

PARTIES

5. Defendant Hughes Aircraft Company ("Hughes") is a corporation which does business at Tucson, Arizona.

6. Defendant Hughes Non-Bargaining Retirement Plan (the "Plan"), is an employee benefit pension plan as defined in Section 2(3) of ERISA, 29 U.S.C. § 1002(3). The Plan does

business in Tucson, Arizona. The Plan is sponsored by Hughes which is an employer, employee benefit plan sponsor and plan administrator pursuant to Section 3(5) and (16) of ERISA, 29 U.S.C. § 1002(5) and (16).

7. Plaintiffs Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernest O. Blandin and Richard E. Hook are retired employees of Hughes and are participants in and beneficiaries of the Plan as defined in Section 3(7) and (8) of ERISA, 29 U.S.C. §§ 1002(7) and (8). Plaintiffs reside in Tucson, Arizona.

JURISDICTION AND VENUE

8. The Court has jurisdiction pursuant to Sections 409(a) and 502(a), (e) of ERISA, 29 U.S.C. § 1114(a) and, 1132(a), (e) and under 28 U.S.C. §§ 1331 and 1337.

9. Venue is proper pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2) because the Plan does business and the Defendants reside or may be found in this District.

CLASS ACTION ALLEGATIONS

10. This action is commenced pursuant to Fed. Rules Civil Pro. Rule 23(b)(1) & (2) as a class action on behalf of a class consisting of all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan.

11. The class members are so numerous that joinder of all persons is impracticable. The class consists of over 10,000 members. There are questions of law and fact common to the class such as (a) whether a termination of the Plan has occurred requiring the equitable distribution of surplus assets to Plan participants; and (b) whether defendants have breached their fiduciary obligations under ERISA by utilizing surplus Plan assets attributable to employee contributions for the sole and exclusive benefit of Hughes rather than for the benefit of Plan participants.

12. The claims of the representative parties are typical of the claims of the classes, and the representative parties will

fairly and adequately represent the interests of the classes. Plaintiffs Stanley Jacobson, Daniel Welsh, Robert E. McMillin, Ernest O. Blandin and Richard E. Hook are participants in the Pension Plan. They were all employed by Hughes for over 5 years prior to their retirements. Their claims are typical of those of the class members.

MATERIAL FACTS

13. Hughes is an aerospace and electronics systems manufacturing company. It was acquired by the General Motors Corporation in 1985 and became a subsidiary of the GM Hughes Electronics Corporation which is a wholly owned subsidiary of the General Motors Corporation.

14. The Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1955, and subsequently amended from time to time. The other plan resulting from the split is the Hughes Bargaining Retirement Plan.

15. The Plan is governed and its terms are evidenced by an agreement executed by Hughes on or about January 1, 1980 and thereafter amended from time to time. The Plan is a qualified pension plan which is intended to comply with the provisions of ERISA and of Section 401 and other applicable provisions of the Internal Revenue Code.

16. Effective January 1, 1991 the Plan was terminated and replaced by a new non-contributory plan covering all non-bargaining employees employed after August 1, 1990 and all non-bargaining employees employed prior to August 1, 1990 who elected not to participate in the Plan. The termination of the contributory Plan and the terms of the new non-contributory plan are evidenced by a document executed by Hughes on April 4, 1991.

17. The Plan provides retirement benefits to eligible retired non-bargaining (non-union) Hughes employees who participated in the Plan and to their eligible beneficiaries, including the plaintiffs.

18. Under the terms of Section 3.4 of the Plan, as a condition of admission to and continued active participation in the Plan, each participant was required to make a contribution to the Plan. In most instances, such contributions were withheld from the participants' pay by the company during each payroll period.

19. Under the terms of Section 3.1 of the Plan, the cost of benefits under the Plan, to the extent not provided by contributions of Participants as provided by contributions of the company not less than in such amounts and at such times as are necessary to fund benefits under the Plan.

20. Under the terms of Section 3.7 of the Plan the administrator is required to maintain a participant Contributions Account for each participant who has made contributions to the Plan.

21. Commencing in 1974 (the year ERISA was enacted) the following contributions to the Plan were made by the active participants and by the company:

Plan Year	Employee	Employer
1974	13,621,214	27,242,428
1975	15,462,525	36,338,253
1976	19,955,945	50,575,021
1977	18,086,393	49,643,953
1978	20,701,322	65,044,140
1979	22,552,274	60,609,646
1980	22,606,766	59,789,473
1981	26,088,475	82,512,517
1982	30,882,960	47,137,426
1983	36,292,781	92,571,925

Plan Year	Employee	Employer
1984	39,265,444	82,300,148
1985	38,718,786	24,139,676
1986	30,359,559	20,782,539
1987	44,981,446	0
1988	43,245,527	0
1989	47,317,008	0
1990	42,915,410	0
TOTAL	**513,053,835**	**698,687,145**

22. At the end of the 1990 Plan year (December 31, 1990) employee contributions since 1974 totaled $513,053,835 and employer contributions totaled $698,687,145.

23. As a result of these contributions and of investment growth of both employer and employee contributions to the Plan, a very substantial overfunding has occurred. By the end of 1985 Plan year assets exceeded the actuarial (present value of accrued benefits) (PVAB) by almost one billion ($1,000,000,000) dollars. As of December 31, 1986, the current value of assets accumulated in the Plan was $2,840,371,000 whereas the present value of accumulated benefits (vested and non-vested) was $1,732,124,000 leaving a surplus in excess of one billion ($1,000,000,000) dollars. The following shows the net Plan assets (assets available for benefits) and benefit liabilities (present value of accumulated benefits, vested and non-vested) since 1986 at the beginning of each Plan year:

Plan Year	Net Assets	PVAB	Excess
1986	2,421,752,000	1,448,529,000	973,223,000
1987	2,840,371,000	1,732,124,000	1,108,247,000
1988	2,993,728,000	1,833,520,000	1,160,208,000
1989	3,286,400,000	2,095,377,000	1,191,023,000
1990	3,853,602,000	2,644,837,000	1,208,765,000

24. At the time General Motors acquired Hughes, on December 31, 1985, the Plan already had accumulated a substantial overfunding. At the same time, the General Motors retirement plan was enormously underfunded. GM's current plan underfunding exceeded seven billion ($7,000,000,000) dollars and was listed by the Pension Benefit Guaranty Corporation as one of the most underfunded pension plans in the country.

25. Shortly after GM acquired control, Hughes ceased making any contributions to the Plan. No Hughes contributions were made from 1986 to the 1990 Plan year. During the same period of time Hughes has continued to require employee contributions. Hughes, under GM's control, has in effect utilized the surplus Plan assets to meet its funding obligations even though a substantial portion of that surplus was generated by employee contributions and their earnings.

26. In 1989 Hughes amended the Plan to provide for an Operational Transition Plan (OTP) which provided significant additional retirement benefits out of Plan assets to certain eligible employees. The purpose of the OTP was to induce certain active employed Plan participants to elect early retirement so as to reduce the workforce and Hughes payroll costs. OTP benefits were made available only to participants who were active employees at the time of the adoption of the

OTP amendment who met certain arbitrary requirements established by Hughes and were not made available to employees who retired prior to the adoption of the OTP amendment or who did not meet the arbitrary requirements.

27. In 1990, Hughes announced that it was creating a new non-contributory retirement plan, effective January 1, 1991, for non-bargaining employees and terminating future enrollment in the contributory Plan. All new salaried employees will automatically become participants in the new non-contributory plan and active employees who were participants in the contributory Plan were given the option of becoming participants in the new non-contributory plan. Active salaried employees who were not participants in the contributory Plan were given the option of joining the Plan or automatically becoming participants in the new non-contributory plan. Effective January 1, 1991 no new participants will be enrolled in the contributory Plan.

28. The retirement benefits provided under the new non-contributory plan are significantly less costly than the benefits provided under the contributory Plan.

29. By creating such a new non-contributory plan Hughes will not have to make any further contributions on behalf of participants of the contributory Plan as the assets of the Plan are substantially in excess of those required to fund all current and future pensions of participants of the contributory Plan.

30. Hughes will not be required to make any further contributions to fund benefits of participants of the contributory Plan but may instead improperly attempt to utilize such surplus Plan assets to fund benefits of participants in the new non-contributory plan.

AS FIRST CAUSE OF ACTION
PURSUANT TO SECTION 403(c)(1) OF ERISA

31. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1) provides that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries.

32. Defendants have violated Section 403 of ERISA by utilizing excess Plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the employer and to the detriment of plaintiffs and the class they represent.

AS A SECOND CAUSE OF ACTION
PURSUANT TO SECTION 404 OF ERISA

33. Defendants owe Plaintiffs and the class they represent the fiduciary duty pursuant to ERISA § 404, (a)(1)(A)(B) 29 U.S.C. § 1104, (A)(1)(A)(B) to discharge their duties for the exclusive purpose of providing benefits to participants and their beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

34. Defendants breached their fiduciary duty to the plaintiffs and the class they represent by utilizing excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of defendant Hughes rather than for the benefit of Plan participants and their beneficiaries.

AS A THIRD CAUSE OF ACTION
PURSUANT TO ERISA § 1033 & 1034

35. ERISA § 203(a), 29 USC § 1053(a), requires that employees be 100% vested in their *own contributions* to a pension plan and that pursuant to 29 U.S.C. § 1053(a)(1), "an

employee's rights in his accrued benefits derived from his own contributions are non-forfeitable."

36. Defendants violated ERISA § 203 by using assets attributable to employees own contributions to meet defendants funding obligations and have therefore caused a divestiture and forfeiture of rights.

AS A FOURTH CAUSE OF ACTION
PURSUANT TO ERISA § 4404

37. ERISA § 4404, 29 U.S.C. § 1344 provides for the distribution of excess plan assets attributable to employer and employees contribution in the event that a plan is terminated.

38. ERISA § 4404(d)(3)(B)), 29 USC § 1344(d)(3) (B), provides that all residual assets attributable to employee contributions must be distributed to employees.

39. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(1)), provides that the Employer may revert excess assets to itself only if:

i. All liabilities of the plan have been satisfied;

ii. The distribution does not contravene any provision; and

iii. The plan provides for such reversion.

40. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(2)(A) (B) (the "Pension Protection Act") provides that any amendment to the plan which permits reversion of surplus assets to the employer upon termination of the plan or increases the amount of the reversion shall not be effective until five years after the amendment was adopted (unless the plan is less than 5 years old in which case if the plan always had the reversion provision it is effective).

41. Under the provisions of ERISA § 4404(D)(3)(A), 29 U.S.C. § 1344(d)(3)(A), before any surplus Plan assets can be distributed to the employer any surplus assets attributable to employee contributions must first be "equitably distributed" to

the employees who made the contributions or to their beneficiaries.

42. Defendants, by creating a new non-contributory plan for all salaried employees employed on or after January 1, 1991 and for all salaried employees employed prior to January 1, 1991 who did not elect to participate in the Plan have, effective January 1, 1991 terminated the Plan within the meaning of ERISA § 4404, 29 USC § 1344 and as such are required to distribute excess assets attributable to employee contribution to the Plan participants in accordance with ERISA § 4404, 29 USC § 1344.

43. The Plan does not contain any provision for reversion of excess assets to the employer upon termination and therefore all excess assets attributable to employer contributions must also be distributed to the participants.

AS AND FOR A FIFTH CAUSE OF ACTION
PURSUANT TO § 403-405 OF ERISA

44. ERISA §§ 403, 404 & 405, 29 USC §§ 1103, 1104 & 1105 impose certain fiduciary duties upon plan fiduciaries.

45. ERISA § 403(c)(1), 29 USC § 1103(c)(1) requires that plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

46. ERISA § 404(1)(A), 29 USC § 1104(1)(A) provides that plan fiduciaries shall expend fund assets for the exclusive purpose of "providing benefits to participant and their beneficiaries" and for "defraying reasonable expenses of administering the plan."

47. ERISA § 406(a)(1)(D), 29 USC § 1106(a)(1)(D) prohibits plan fiduciaries to "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan."

48. Section 6.5(b) of the Plan provides that no amendment shall be made at any time under which any part of the Trust

Fund may be diverted to purposes other than for the exclusive benefit of the participants and their beneficiaries.

49. The defendants intend to divert assets of the Plan to pay benefits to participants of the new non-contributory plan who are not participants in the Plan.

50. Paying benefits from assets of the Plan to persons who are not participants of the Plan would be in violation of ERISA §§ 403 and 404, 29 USC §§ 1103 and 1104 and of Section 6.5(d) of the Plan which prohibit using Plan assets for anyone other than Plan participants and their beneficiaries.

51. Paying benefits from assets of the Plan to participants of the new non-contributory plan constitutes a unlawful transfer of assets from the Plan to the new plan for the benefit of defendant Hughes, a party in interest as defined in ERISA § 3(14), 29 USC § 1002(14), which, under the terms of the new non-contributory plan, is required to fund all such benefits. Such a transfer of assets is prohibited by ERISA § 406(a)(1)(D), 29 USC § 1106(a)(1)(D).

AS AND FOR A SIXTH CAUSE OF ACTION
<u>PURSUANT TO ARTICLE V § 5.2 OF THE PLAN</u>

52. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) provides that the plan fiduciaries shall carry out their duties "in accordance with the documents and instruments governing the plan."

53. ERISA § 502(a)(1)(B) provides, in part, that a plan participant or beneficiary may bring an action to "enforce his rights under the terms of the plan."

54. Article V § 5.2 of the Plan provides in relevant part that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan."

55. Defendants provided OTP benefits out of Plan assets in a discriminatory manner by making such benefits available only to certain participants who were active employees of

Hughes at the time of the adoption of the OTP amendment and not to existing retirees and certain other Plan participants. Defendants, by providing OTP benefits in such a discriminatory manner, breached the terms of Article V § 5.2 of the Plan and of ERISA.

<u>RELIEF</u>

56. Wherefore Plaintiffs request a judgment against the Defendants:

a. Equitably distributing all excess Plan assets attributable to employer contributions to the Plan participants in the form of improved benefits;

b. Equitably distributing all excess Plan assets attributable to employee contributions to Plan participants in the form of improved benefits;

c. Enjoining the defendants from using or diverting any assets of the Plan for the purposes of paying benefits under or administering the non-contributory plan;

d. Appointing a neutral trustee to administer the Plan in accordance with the provisions of ERISA and the judgment of this Court;

e. Ordering the defendant Hughes Aircraft Company to restore to the Plan all Plan assets used to pay OTP benefits and/or pension benefits to persons who are not participants of the contributory Plan.

f. Awarding plaintiffs reasonable attorneys fees, costs and disbursements incurred in connection with the prosecution of this action;

g. Granting such other and further relief as the Court deems equitable, just and proper.

SERVICE REQUIRED BY ERISA

57. A copy of this Complaint has been served on the Secretary of Labor and Secretary of the Treasury pursuant to Section 502(h) of ERISA, 29 U.S.C. § 1132(h).

Dated: New York, New York
January 17, 1992

Yours, etc.
JEROME TAUBER, A Member of
SIPSER, WEINSTOCK, HARPER & DORN

/s/ Jerome Tauber
JEROME TAUBER

- and -

SALLY HART WILSON, of
BOGUTZ AND GORDON, P.C.

/s/ Sally Hart Wilson
SALLY HART WILSON
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CIV-92-031-TUC JMR

DECLARATION OF ANN L. VERHEY IN SUPPORT OF DEFENDANTS' MOTIONS TO DISMISS, FOR A MORE DEFINITE STATEMENT, AND TO STRIKE PORTIONS OF THE COMPLAINT

I, Ann L. Verhey, hereby declare as follows:

1. I am a citizen of the United States and a resident of Los Angeles, California. I am presently employed by Hughes Aircraft Company ("Hughes") in the position of Assistant Treasurer, and I have been employed by Hughes since 1983. I have either personal knowledge of or access to records containing the facts set forth in this Declaration and, if called as a witness, could and would competently testify about them under oath.

2. I have held the position of Assistant Treasurer at Hughes since January 1988. In this position I am responsible for administering the financial aspects of Hughes' benefit and insurance programs, including the retirement plan for non-bargaining employees. Records concerning the Hughes Non-Bargaining Retirement Plan (the "Plan"), including copies of the Plan itself and its amendments, are maintained under my direction and control. These records are maintained in the ordinary course of business and I utilize these records in performing my functions for Hughes.

3. Attached hereto as Exhibit "1" and incorporated herein by this reference is a true and correct copy of the Hughes Non-Bargaining Retirement Plan as it existed in 1990, or just prior to the amendments which became effective January 1, 1991. At the end of 1990 the Plan consisted of the Plan executed on October 30, 1985, an amendment executed on December 23, 1986, an amendment executed on March 29, 1988, and an amendment executed on November 28, 1989. The Plan is a defined benefit plan and, as of 1990, provided a contributory benefit structure only.

4. Attached hereto as Exhibit "2" and incorporated herein by this reference is a true and correct copy of the Hughes Non-Bargaining Retirement Plan as amended effective January 1, 1991. The Plan as executed on April 4, 1991, remains a single defined benefit plan and is amended to provide two benefit structures, one of which is a contributory benefits structure and the other of which is a non-contributory benefits structure.

5. In the Fall of 1990, the active employee participants in the Plan were given the opportunity to elect either the contributory benefits structure or the non-contributory benefits structure of the Plan to become effective January 1, 1991. In fact, in 1990 approximately 2% of the employee participants participating in the contributory benefits structure elected to change to the non-contributory benefits structure. As of the beginning of 1991, approximately 66,000 Plan participants were accruing benefits under, receiving benefits under, or were

terminated employees with vested benefits in, the contributory benefits structure.

I declare, under penalty of perjury under the laws of the state of California and the United States of America, that the foregoing is true and correct. This Declaration is executed on March 12, 1992, at Los Angeles, California.

/s/ Ann L. Verhey
ANN L. VERHEY

EXHIBIT 1

AMENDMENT TO HUGHES
NON-BARGAINING RETIREMENT PLAN

THIS AGREEMENT, executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware (hereinafter "Company"), evidences the terms of an Amendment to the Hughes Non-Bargaining Retirement Plan. This Amendment, together with the Plan executed on the 30th day of October, 1985, the Amendment executed on the 23rd day of December, 1986, and the Amendment executed on the 29th day of March, 1988, constitutes the entire Plan.

* * * *

2. Section 4.12(d) shall be deleted in its entirety and the following substituted in its place:

(d) Within a reasonable period of time before the applicable election period, each Participant or Former Participant who may be affected by this Section shall be furnished, by mail or personal delivery, with a written explanation of:

(i) a general description of the terms and conditions of the joint and survivor annuity available under this Section and the circumstances under which the Benefit will be so paid,

(ii) the availability of the election described in subsection (f), and the effect of such an election,

(iii) the rights of the Participant's spouse under subsection (f), and

(iv) the right of a Participant to revoke a previous election under subsection (f) and the effect of such revocation.

3. Section 4.12(e) shall be deleted in its entirety and the following substituted in its place:

(e) The applicable election period under subsection (d) shall be for the joint and survivor annuity available under this Section, the ninety day period ending on the Annuity Starting Date.

4. Section 4.12(i) shall be deleted in its entirety and the following substituted in its place:

(i) Any election made under subsection (f) will be effective only if the Participant or Former Participant's spouse signs a written consent and the spouse's signature is witnessed by a Plan representative or Notary Public. If the Participant or Former Participant establishes to the satisfaction of the Administrator that such a written consent cannot be obtained because the spouse cannot be located, the election will be deemed to be effective without the written consent of the spouse.

5. Section 4.14(b) shall be deleted in its entirety and the following substituted in its place:

(b) If a Participant's age is 55 or older, has a Separation from the Service due to his death, or has a Separation from the Service because of retirement but dies prior to the first day of the month coinciding with or next following retirement within which the initial payment of any benefit is or would be payable to him, and leaves a surviving spouse, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall in accordance with the Rules of the Plan elect to receive either the Benefit described in subsection (c) or the Benefit described in subsection (d). In the event benefits are paid under this subsection, then no beneficiary (other than the spouse) shall be entitled to receive benefits under the Plan, except as provided in subsection (c)(ii).

6. Section 4.14(e) shall be deleted in its entirety and the following substituted in its place:

(e) Unless the provisions of Section 4.14(b) apply, if a Participant dies with a Vested Retirement Benefit or if a

Former Participant dies with a Vested Retirement Benefit after a Separation from the Service, and such death is prior to the due date of the first monthly Benefit payable to him under the Plan and if he is survived by the spouse to whom he was married throughout the three hundred and sixty-five day period immediately preceding his death, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall receive a survivor annuity consisting of:

(i) if the Former Participant dies after his earliest retirement age, such spouse shall, in accordance with the Rules of the Plan, elect to receive either the benefit described in subsection a or the benefit described in subsection b.

a. The Benefit described in this subsection shall consist of:

i. a monthly payment to such spouse on the first day of each calendar month commencing with the month following the month of such Former Participant's death, and continuing through the month of such spouse's death, in an amount equal to the monthly Benefit which such spouse would have received under Section 4.11(b)(i) had the Former Participant retired immediately prior to his death and elected under Section 4.11(b) to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be, in the form of a fixed annuity contract naming such spouse as Contingent Annuitant and providing that such monthly payments to the surviving Contingent Annuitant after the Former Participant's death should be equal to the payments to the Former Participant during his life, and

ii. upon the death of such spouse, payment in cash in a lump sum to such Former Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of the sum described in

Section 4.2(a)(ii)a, over the aggregate of all payments made under paragraph i.

b. The Benefit described in this subsection shall consist of:

i. a lump sum payment payable not later than the end of the Plan Year following the Plan Year of the death of such Former Participant to the surviving spouse in an amount equal to the sum referred to in Section 4.2(a)(ii)a, and

ii. a monthly payment, on the first day of each calendar month commencing with the month following the month of such Former Participant's death, and ending with the month of such spouse's death, in an amount Actuarially Equivalent to the sum of the Participant's Accrued Benefit Derived from Company Contributions, and an amount Actuarially Equivalent to the excess, if any of his Accrued Benefit Derived from Participant Contributions over the Benefit provided for under this subparagraph b as computed without regard to this subparagraph i.

(ii) If the Participant or Former Participant dies prior to his earliest retirement age, a monthly payment commencing on the first day of the calendar month following the month in which the Participant or Former Participant would have attained his earliest retirement age and ending with the calendar month in which the spouse dies, equal to 50% of the monthly amount the Participant or Former Participant would have received if he retired electing a joint and survivor annuity under Section 4.12, and if such Participant had:

a. a Separation from the Service on the date of death,

b. survived to the earliest retirement age,

c. retired with an immediate qualified joint and survivor annuity at the earliest retirement age,

d. died on the day after the day on which such Participant would have attained the earliest retirement age, and

e. in the case of an individual who has a Separation from the Service before the date of such individual's death, subparagraph a shall not apply; plus

(iii) upon the death of such spouse, payment shall be made in cash in a lump sum to such Participant or Former Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of:

a. the sum described in Section 4.2(a)(ii)a over

b. the aggregate of all payments made under subsection (e).

(f) Subsection (e) shall apply only if:

(i) a Participant has at least one Hour of Service with the Company on or after August 23, 1984; or

(ii) a Participant has at least one Hour of Service on or after January 1, 1976, and when such Participant incurred a Separation from the Service he had ten or more Years of Vesting Schedule Service; or

(iii) a Participant who has an Hour of Service on or after September 2, 1974 was employed by the Company after the earliest date on which such Participant was eligible for early retirement benefits under the Plan; and

(iv) such Participant dies after August 23, 1984 prior to reaching his Annuity Starting Date.

* * * *

8. A new Article VIII shall be added to the Plan as follows:

ARTICLE VIII

ORGANIZATION TRANSITION PLAN RETIREMENT BENEFIT

Section 8.1 - Eligibility

Any Participant who:

(a) Is employed by the Company and is a Participant in the Plan on May 23, 1989 (even though the Participant's obligation to contribute to his Participant Contributions Account may have been suspended under Section 2.5 prior thereto);

(b) Has or would have had 5 or more years of Continuous Service on or before December 31, 1989, except for participation in the Organization Transition Plan adopted by the Executive Committee of the Board of Directors of the Company on May 30, 1989, as modified by resolutions adopted as of July 24, 1989 (hereinafter "OTP");

(c) Prior to December 31, 1989, incurs a Separation from the Service because the Participant is laid off under, or is given the opportunity by the Company in its sole discretion to participate in, the OTP; and

(d) Agrees to the conditions of participating in the OTP by, among other things, executing a general release, and elects to receive the OTP Retirement Benefit in lieu of the severance pay benefit under Section 4.1(c) of the Hughes Transition Pay Plan,

shall become eligible for the OTP Retirement Benefit.

Section 8.2 - The OTP Retirement Benefit.

For a Participant who satisfies the eligibility requirements of Section 8.1 and who is:

(a) Not a Highly Compensated Employee (as that term is defined in Section 414(q) of the Code), the OTP Retirement Benefit shall be:

(i) the additional Accrued Benefit the Participant would have received if:

a. the Participant was within 3 years of age 55, age 65 or qualifying for the benefit provided by Section 4.8(c); and

b. the Participant were credited with Benefit Accrual Service in whole year increments for as long as it takes the Participant (up to a maximum of 3 years) to reach age 55, age 65, or qualifying for the benefit provided by Section 4.8(c), whichever maximizes the Participant's Accrued Benefit, and

(ii) the additional Accrued Benefit the Participant would have received if the Participant were credited with Benefit Accrual Service and his Participant Contributions Account were credited with employee contributions that would have been made under Section 3.4 for the number of years equal to:

a. 3 years, less

b. the number of years needed to satisfy the benefit provided in Section 8.2(a)(i)b.

Any benefit payable under this Section 8.2(a)(ii) shall not be subject to the cost of living adjustment provided by Section 4.6.

(b) A Highly Compensated Employee shall receive no increase in his Accrued Benefit from the Plan.

Section 8.3 - Definition of Compensation.

For purposes of calculating the Participant's Career Average Benefit (Section 4.5) and the Benefit Based on Final Average Compensation (Section 4.3), each Participant eligible under Section 8.1 shall have his Benefit calculated:

(a) As if the Participant's base rate of pay in effect at the time of his Separation from the Service were annualized and paid for an additional 3 years; and

(b) By including in each such Participant's Compensation the bonus payments from the Management Incentive Plan, Supplemental Compensation and Salary Adjustment Plan as if paid for 1989, 1990 and 1991 at the same level as such Participant's 1988 bonus payments.

Section 8.4 - Cost of Living Adjustment for OTP Retirement Benefit

If a Participant receives an OTP Retirement Benefit under Section 8.2 and if such a Participant has a Separation from the Service on or after his fifty-second birthday, a cost of living adjustment as provided by Section 4.6 (a) shall be used to adjust:

(a) the monthly Benefit payable without regard to the OTP Retirement Benefit; and

(b) the additional Benefit provided under Section 8.2(a)(i), but shall not be used to adjust the additional Benefit under Section 8.2(a)(ii).

Section 8.5 - Vesting of Retirement Benefit

If a Participant satisfies the eligibility requirements under Section 8.1, then his Accrued Benefit Derived from Company Contributions (including his OTP Retirement Benefit under Section 4.15 (b)) shall be 100% Vested.

Section 8.6 - Commencement of Payment of Retirement Benefit

Any Participant who satisfies the eligibility requirements under Section 8.1, and who is age 52 or older, may retire and receive his Early Retirement Benefit.

Section 8.7 - Death Benefit

The death benefit of any Participant who is eligible for the OTP Retirement Benefit under Section 8.1 and who dies prior

to benefit commencement shall be calculated and paid in accordance with Section 4.14 but shall include the additional OTP Retirement Benefit determined in accordance with Section 8.2.

Executed at Los Angeles, California, this 28th day of November, 1989.

HUGHES AIRCRAFT COMPANY

By /s/ [illegible]
EXECUTIVE VICE PRESIDENT

By /s/ [illegible]
PRESIDENT

APPROVED:

By /s/ [illegible]
General Counsel
Hughes Aircraft Company

AMENDMENT TO HUGHES
NON-BARGAINING RETIREMENT PLAN

THIS AGREEMENT, executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware (hereinafter "Company"), evidences the terms of an Amendment to the Hughes Non-Bargaining Retirement Plan. This Amendment, together with the Plan executed on the 30th day of October, 1985, and the Amendment executed on the 23rd day of December, 1986, constitutes the entire Plan.

*   *   *   *

4. Section 3.4 shall be deleted in its entirety and the following substituted in its place:

Section 3.4 - Required Participant Contributions

As a condition of his admission to and continued active participation in the Plan, each Participant, except a Participant on inactive status under Section 2.7, shall contribute to his Participant Contributions Account for each payroll period during his participation in the Plan prior to his Early or Normal Retirement Date, as provided under Rules of the Plan, on and after January 1, 1986 three percent of his compensation earned in the Plan Year (and prior to January 1, 1986 two percent of the first $3,600 of his Compensation earned in a Plan Year and four percent of such Compensation, if any, in excess of $3,600). A Participant, who is an Employee, except a Participant on inactive status under Section 2.7, receiving Benefits under the Income Insurance Plan shall contribute on and after January 1, 1986 three percent (and prior to January 1, 1986 four percent) of his regular pay, including any shift differential and then current cost-of-living allowances for his job classification and regularly-scheduled work-week at the rate in effect on his last day on the job. A Union Officer shall contribute the same amount he would have

contributed if he had received the regular wage, including any shift differential and cost-of-living allowances for his job classification and regularly-scheduled work-week, at the rate in effect for the pay period in question, under the then applicable collective bargaining agreement.

5. Section 3.8 shall be deleted in its entirety and the following substituted in its place:

Section 3.8 - Withdrawals and Repayments

(a) Subject to the provisions of Section 4.12, a Participant who has a Separation from the Service may withdraw in cash the amount referred to in Section 4.2(a)(ii)a upon written notice to the Administrator at any time during a Separation from the Service, provided that such written notice is given prior to the Participant's Annuity Starting Date.

(b) A Participant, but not a Former Participant, may either

(i) within 24 months following his first rehire or recall which occurs prior to January 1, 1983, or

(ii) within 60 months following his first rehire or recall which occurs after December 31, 1982

after a withdrawal under subsection (a), and prior to his Annuity Starting Date while employed by the Company, repay to the Trust in full (but not partially) the amount he withdrew under subsection (a) after 1975 (but not earlier), together with interest compounded annually on such amount at the rate referred to in Section 3.7, and shall thereby be restored to the same Accrued Benefit he would have had if no withdrawal had been made after 1975.

(c) Withdrawals from the Plan other than as permitted in subsection (a) are prohibited.

6. Section 4.3 shall be deleted in its entirety and the following substituted in its place:

Section 4.3 - Alternative Formula: Benefit Based on Final Average Monthly Compensation

A Participant's alternative Benefit determined under this Section shall be an amount determined by subtracting

(a) the product of

(i) the factor of .015,

(ii) his Total Benefit Accrual Service (not in excess of 33-1/3 years),

(iii) the factor determined dividing

a his benefit Accrual Service by

b his Total Benefit Accrual Service, and

(iv) his Primary Insurance Amount, from

(b) the product of

(i) the factor of .0175 (but in the case of Benefits payable to a Participant whose last Separation from the Service was after June 30, 1978 and before December 7, 1980, the factor of .01625, or whose last Separation from the Service is before July 1, 1978, the factor of .015),

(ii) his Benefit Accrual Service, and

(iii) his Final Average Monthly Compensation.

7. Section 4.4 shall be deleted in its entirety and the following substituted in its place:

Section 4.4 - Alternative Formula: Minimum Benefit

A Participant's alternative Benefit determined under this Section shall be the product of

(a) his Benefit Accrual Service, and

(b) the sum of

(i) \$13.00 (but in the case of Benefits payable to a Participant whose last Separation from the service was after December 5, 1982 and before January 1, 1986, the amount of \$11.00; but in the case of Benefits payable to a Participant whose last Separation from the Service was after December 3, 1979 and before December 5, 1982, the amount of \$9.50; and in the case of Benefits payable to a Participant whose last Separation from the Service was after December 31, 1975 and before December 3, 1979, the amount of \$7.00) and

(ii) the product of

a the factor of .005 and

b his Final Average Monthly Compensation.

8. Section 4.5 shall be deleted in its entirety and the following substituted in its place:

Section 4.5 - Alternative Formula: Career Average Benefit

A Participant's alternative Benefit determined under this Section shall be the sum of

(a) the product of

(i) the fraction one twenty-fourth (1/24th) and

(ii) the aggregate principal amount of his Participant Contributions contributed prior to January 1, 1986 under Section 3.4 or its predecessor, net of any unrepaid withdrawals under Section 3.8, and

(b) the amount by which

(i) his Accrued Benefit as of December 31, 1975 (as shown on the Administrator's records) exceeds

(ii) one twenty-fourth (1/24th) of the aggregate principal amount of his Participant Contributions determined as of such date, and

(c) on or after January 1, 1986, one percent of the first \$3,600 of his Compensation earned in a Plan Year and two percent of such Compensation in excess of \$3,600.

9. Section 4.14 shall be deleted in its entirety and the following substituted in its place:

Section 4.14 - Death Benefit

(a) If a Participant or Former Participant dies prior to the due date of the first monthly Benefit payment payable to him under the Plan, and if the other subsections of this Section are not applicable, there shall be paid in cash in a lump sum to his properly designated Beneficiary or Beneficiaries an amount equal to the balance of his Participant Contributions Account and all his other Benefits (if any) shall be forfeited.

(b) If a Participant's age is 55 or older, has a Separation from the Service due to his death, or has a Separation from the Service because of retirement but dies prior to the first day of the month coinciding with or next following retirement within which the initial payment of any benefit is or would be payable to him, and leaves a surviving spouse, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall in accordance with Rules of the Plan elect to receive either the Benefit described in subsection (c) or the Benefit described in subsection (d). In the event benefits are paid under this subsection, then no beneficiary (other than the spouse if so designated) shall be entitled to receive benefits under the Plan, except as provided in subsection (c)(ii).

(c) The Benefit described in this subsection shall consist of

(i) a monthly payment to such spouse on the first day of each calendar month commencing with the month following the month of such Participant's death, and continuing through the month of such spouse's death, in an amount equal to the monthly Benefit which such spouse

would have received under Section 4.11(b)(i) had the Participant retired immediately prior to his death and elected under Section 4.11(b) to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be, in the form of a fixed annuity contract subject to adjustment in the manner provided in Section 4.6, naming such spouse as Contingent Annuitant and providing that such monthly payments to the surviving Contingent Annuitant after the Participant's death should be equal to the payments to the Participant during his life, subject to adjustment in the manner provided in Section 4.6, and

(ii) upon the death of such spouse, payment in cash in a lump sum to such Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of

a the sum described in Section 4.2(a)(ii)a over

b the aggregate of all payments made under paragraph (i).

(d) The Benefit described in this subsection shall consist of

(i) a lump sum payment payable not later than the end of the Plan Year following the Plan Year of the death of such Participant to the surviving spouse in an amount equal to the sum referred to in Section 4.2(a)(ii)a, and

(ii) a monthly payment, adjusted in the manner provided in Section 4.6, on the first day of each calendar month commencing with the month following the month of such Participant's death, and ending with the month of such spouse's death, in an amount Actuarially Equivalent as so adjusted to the sum of

a the Participant's Accrued Benefit Derived from Company Contributions, and

b an amount Actuarially Equivalent to the excess, if any of his Accrued Benefit Derived from Participant Contributions over the Benefit provided for under this subsection (d) as computed without regard to this subparagraph b.

(e) Unless the provisions of Section 4.14(b) apply, if a Participant dies with a Vested Retirement Benefit or if a Former participant dies with a Vested Retirement Benefit after a Separation from the Service, and such death is prior to the due date of the first monthly Benefit payable to him under the Plan and if he is survived by the spouse to whom he was married throughout the three hundred and sixty-five day period immediately preceding his death, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall receive a survivor annuity. The survivor annuity shall be a monthly payment commencing on the first day of the calendar month following the month in which the Participant or Former Participant dies or would have attained his earliest retirement age, whichever is later, and ending with the calendar month in which the spouse dies, consisting of:

(i) if the Former Participant dies after his earliest retirement age, a monthly payment equal to 50% of the monthly amount the Former Participant would have received had he retired on the day before death occurred and was entitled to a joint and survivor annuity under Section 4.12; or

(ii) if the Participant or Former Participant dies prior to his earliest retirement age, a monthly payment equal to 50% of the monthly amount the Participant or Former Participant would have received if he retired electing a joint and survivor annuity under Section 4.12, and if such Participant had:

a a Separation from the Service on the date of death,

b survived to the earliest retirement age,

c retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and

d died on the day after the day on which such Participant would have attained the earliest retirement age, and

e in the case of an individual who has a Separation from the Service before the date of such individual's death, subparagraph a shall not apply; plus

(iii) upon the death of such spouse, payment shall be made in cash in a lump sum to such Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of

a the sum described in Section 4.2(a)(ii)a over

b the aggregate of all payments made under subsection (e).

(f) Subsection (e) shall apply only if:

(i) a Participant has at least one Hour of Service with the Company on or after August 23, 1984; or

(ii) a Participant has at least one Hour of Service on or after January 1, 1976, and when such Participant incurred a Separation from the Service he had ten or more Years of Vesting Schedule Service; or

(iii) a Participant who has an Hour of Service on or after September 2, 1974 was employed by the Company after the earliest date on which such Participant was eligible for early retirement benefits under the Plan; and

(iv) such Participant dies after August 23, 1984 prior to reaching his Annuity Starting Date.

* * * *

Executed at Los Angeles, California, this 29th day of March, 1988.

HUGHES AIRCRAFT COMPANY

By /s/ [illegible]

By /s/ [illegible]

APPROVED:

By /s/ [illegible]
General Counsel
HUGHES AIRCRAFT COMPANY

AMENDMENT TO HUGHES
NON-BARGAINING RETIREMENT PLAN

THIS AGREEMENT, executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware (hereinafter "Company"), evidences the terms of an Amendment to the Hughes Non-Bargaining Retirement Plan. This Amendment, together with the Plan executed on the 30th day of October, 1985, constitutes the entire Plan.

* * * *

2. Section 4.11(e) shall be deleted in its entirety and the following substituted in its place:

(e) If a Participant dies after his Annuity Starting Date, the remaining portion of his Benefit, if any, may continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death. If a Participant dies before his Annuity Starting Date, the Participant's entire Benefit must be distributed in accordance with the provisions of Section 4.14 and in any event either no later than five years after the Participant's death, or if any portion of the Participant's benefit is payable to a designated Beneficiary, distributions may be made in substantially equal installments over the life or life expectancy of the designated Beneficiary commencing no later than one year after the Participant's death; provided, however, if the designated Beneficiary is the Participant's surviving spouse, the date on which distributions are required to begin shall not be earlier than the date on which the Participant would have attained age 70-1/2.

3. Section 4.12(d) shall be deleted in its entirety and the following substituted in its place:

(d) Within a reasonable period of time before the applicable election period, each Participant or Former Participant who may be affected by this Section shall be furnished, by mail or personal delivery, with a written explanation of

(i) a general description of the terms and conditions of the joint and survivor annuity available under this Section and the survivor annuity available under Section 4.14(c), (d) and (e), and the circumstances under which the Benefit will be so paid,

(ii) the availability of the election described in subsection (f), and the effect of such an election,

(iii) the rights of the Participant's spouse under subsection (f),

(iv) the right of a Participant to revoke a previous election under subsection (f) and the effect of such revocation, and

(v) in the case of an early survivor annuity the Company shall provide each Participant within the period beginning on the first day of the Plan Year in which the Participant attains age 32 and ending with the close of the Plan Year in which the Participant attains age 35, a written explanation of the early survivor annuity in such terms and in such manner as would be comparable to the explanation provided for meeting the requirements of paragraph (i) applicable to the joint and survivor annuity.

If a Participant enters the Plan after the first day of the Plan Year in which the Participant attained age 32, the Company shall provide notice no later than the close of the second Plan Year succeeding the entry of the Participant in the Plan.

If a Participant enters the Plan after the first day of the Plan Year in which the Participant attained age 32, the Company shall provide notice no later than the close of the second Plan Year succeeding the entry of the Participant in the Plan. If a Participant has a Separation from the Service before age 32, the Company shall provide notice no later than one year following such separation.

4. Sec. 4.14(a) shall be deleted in its entirety and the following substituted in its place:

Section 4.14 - Death Benefit

(a) If a Participant or Former Participant dies prior to the due date of the first monthly Benefit payment payable to him under the Plan, and if the other subsections of this Section are not applicable or if the Participant or Former Participant has elected not to receive the benefit under subsection (b) or (e), in writing in the manner prescribed by the Administrator, and if the Participant's spouse has consented to such election in accordance with Section 4.12(i), there shall be paid in cash in a lump sum to his properly designated Beneficiary or Beneficiaries an amount equal to the balance of his Participant Contributions Account and all his other Benefits (if any) shall be forfeited. A Participant may revoke his election not to receive the benefit under subsection (b) or (e) at any time and any number of times within the applicable election period described in Section 4.12(e)(ii).

5. Sec. 4.16(b) shall be deleted in its entirety and the following substituted in its place:

(b) If the retirement Benefit under the Plan commences before age 62, the maximum annual benefit described in paragraph (i) shall be reduced actuarially, using an interest rate which is the greater of 5% or the rate described in Section 1.6 used to determine the

Actuarial Equivalent of the Early Retirement Benefit, for each year prior to age 62 down to age 55, but in no event lower than $75,000.00. If the retirement Benefit under the Plan commences after age 65, the Benefit may not exceed the lesser of the Actuarial Equivalent of a $90,000 annual benefit beginning at age 65 or 100% of the Participant's average Compensation for the three consecutive calendar years while participating in the Plan in which the Participant's Compensation was highest. To determine the Actuarial Equivalent for a Benefit beginning after age 65 in the preceding sentence, the interest rate assumption used shall be the lesser of 5% or the rate described in Section 1.6. As of January 1 of each calendar year, the dollar limitation of paragraph (i) will be changed as determined by the Commissioner of Internal Revenue for that calendar year and will become effective as the maximum annual benefit for the Plan for that year. The maximum annual benefit for a calendar year applies to limitation years ending with or within that calendar year.

* * * *

Executed at Los Angeles, California, this 23rd day of December, 1986

HUGHES AIRCRAFT COMPANY

By /s/ [illegible]

By /s/ [illegible]

APPROVED:

By /s/ [illegible]
General Counsel
HUGHES AIRCRAFT COMPANY

HUGHES NON-BARGAINING RETIREMENT PLAN

THIS AGREEMENT, executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware (hereinafter "Company"), evidences the terms of the Hughes Non-Bargaining Retirement Plan (hereinafter "Plan"). This Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1951, and subsequently amended from time to time thereafter. The other plan resulting from the split is known as the Hughes Bargaining Retirement Plan. In order to comply with the requirements of the Tax Reform Act of 1984 and the Retirement Equity Act of 1984, this further amendment to the Plan is effective, unless otherwise specifically stated, as of January 1, 1985 as to persons who were Employees or who retired on or after such date. For Employees who terminated or retired on or after such date January 1, 1985, benefits shall be determined by the Hughes Non-Bargaining Retirement Plan in effect prior to January 1, 1985, or if applicable, by the provisions of the Hughes Retirement Plan in effect prior thereto.

The purposes of the Plan are:

(1) To stimulate and maintain among eligible employees of the Companies, a sense of responsibility, cooperative effort and a sincere interest in the progress and success of the Companies.

(2) To increase the efficiency of such Employees and to encourage them to remain with the Companies until retirement from active service.

The Plan is a qualified pension plan which is intended to comply with the provisions of Section 401 and other applicable provisions of the Internal Revenue Code, similar provisions of the California Revenue and Taxation Code, Section 7(d)(4) of the Fair Labor Standards Act of 1938, as amended, and the Employee Retirement Income Security Act of 1974.

ARTICLE I

DEFINITIONS

* * * *

Section 1.3 - Accrued Benefit

The "Accrued Benefit" of a Participant, as of his Separation from the Service, means the greatest of (a), (b), or (c):

(a) the greater of

(i) his Normal Retirement Benefit determined under Section 4.2, without regard to Section 4.3, but with reference to the greater of the alternative Benefits under Section 4.4 or 4.5, calculated on the basis of his Benefit Accrual Service as of such Separation from the Service, or

(ii) paragraph (i) of subsection (a) calculated as if the Separation from the Service of the Participant were on March 1, 1982, as if all Compensation for the month of February 1982 were the figures shown as paid on the Company's records ending with the last payroll period ending before March 1, 1982, and as if all the Participant's vacation not taken as shown at close of a Company's records for the February 1982 accounting month were paid to the Participant within such payroll period.

(b) the greater of

(i) his Normal Retirement Benefit determined under Section 4.3 as if

a there were added to his Total Benefit Accrual Service the period from the date of such Separation from the Service to his Normal Retirement Date and

b his Primary Insurance Amount were determined under Section 1.45, or

(ii) Paragraph (i) of subsection (b) calculated as if the Separation from the Service of the Participant were on March 1, 1982 as if the Compensation for the month of February, 1982 were the figures shown as paid on the Company's records ending with the last payroll period ending before March 1, 1982, and as if all the Participant's vacation not taken as shown at close of a Company's records for the February 1982 accounting month were paid to the Participant within such payroll period.

(c) the Actuarial Equivalent of his total Participant Contributions without interest, exclusive of Participant Contributions made prior to a break in Continuous Service Commencing before 1976.

Section 1.4 - Accrued Benefit Derived from Company Contributions

The "Accrued Benefit Derived from Company Contributions" of a Participant as of his Separation from the Service means that Benefit equal to the excess (if any) of the Participant's Accrued Benefit over his Accrued Benefit Derived from Participant Contributions.

Section 1.5 - Accrued Benefit Derived from Participant Contributions

The "Accrued Benefit Derived from Participant Contributions" of a Participant as of his Separation from the Service means the lesser of

(a) his Accrued Benefit, and

(b) his annual benefit in the form of a single life annuity (without ancillary benefits) commencing at Normal Retirement Age, equal to the Participant Contributions Account multiplied by the appropriate conversion factor of 10% multiplied by an actuarial adjustment factor of 68%, or such other percentage as may be required by law.

* * * *

Section 1.7 - Administrator

"Administrator" means HUGHES AIRCRAFT COMPANY, acting through its officers or their delegates, and not through its Board of Directors, except that during such time as a Committee is in existence, such Committee shall be the Administrator. The Administrator shall function as provided in the Plan, the Trust Agreement and ERISA.

* * * *

Section 1.11 - Benefit

The "Benefit" of a Participant means payments payable in the amounts, to the persons, at the times, and over the applicable period (including any final lump-sum payment) specified in Article IV.

Section 1.12 - Benefit Accrual Service

"Benefit Accrual Service" of a Participant means the total, expressed in years and fractional years, of

(a) those Accounting Months (treating each Accounting Month as one-twelfth year and excluding Accounting Months commencing before a break in his Continuous Service commencing before 1976) for any part or all of which he made contributions to the Plan as a Participant, Union Officer, or participant in the Income Insurance Plan; and, as applicable, either

(b) for a person employed by a Company on January 1980, benefit accrual service credited to such Employee under the Hughes Retirement Plan prior to January 1, 1980, provided such Employee satisfied the requirements of Section 2.1(b)(iii) of the Plan on such January 1st, or

(c) for a former Employee not employed by a Company on January 1, 1980, benefit accrual service credited to such former Employee under the Hughes Retirement Plan prior to January 1, 1980, provided such former Employee's last job classification satisfied the requirements of Section 2.1(b)(iii) of the Plan.

* * * *

Section 1.22 - Early Retirement

"Early Retirement" of a Participant or Former Participant means his retirement upon his Early Retirement Date.

Section 1.23 - Early Retirement Benefit

"Early Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.8.

* * * *

Section 1.33 - Late Retirement Benefit

"Late Retirement Benefit" of a Participant or Former Participant means the Benefit payable under Section 4.10.

Section 1.34 - Late Retirement Date

"Late Retirement Date" of a Participant means the first day of the calendar month coinciding with or next following his Separation from the Service occurring later than his Normal Retirement Date, but in no event later than the date under Section 1.9(d).

* * * *

Section 1.37 - Normal Retirement Benefit

"Normal Retirement Benefit" means the Benefit payable under Section 4.2.

Section 1.38 - Normal Retirement Date

"Normal Retirement Date" of a Participant or Former Participant means the first day of the calendar month coincident with or next following his sixty-fifth birthday.

* * * *

Section 1.40 - Participant Contributions

"Participant Contributions" of a Participant means his contributions to the Plan under Section 3.4 or its predecessor.

Section 1.41 - Participant Contributions Account

"Participants Contributions Account" of a Participant means his individual account established in accordance with Section 3.7.

Section 1.42 - Plan

"Plan" means Hughes Non-Bargaining Retirement Plan.

* * * *

Section 1.45 - Primary Insurance Amount

The "Primary Insurance Amount" of a Participant means the monthly primary insurance amount of his old age insurance benefit determined as of his Normal Retirement Date under the federal Social Security Act as in effect on the date of his Separation from the Service, whether more or less than the amount which would be payable if such Act remained unamended until that Date and whether or not the Participant actually applies for and receives such amount for any month, by assuming that he will receive Compensation at rates applicable on the date of such Separation from the Service, over a further period of employment extending to his Normal Retirement Date. The Primary Insurance Amount of a Participant who again becomes a Participant following his Separation from the Service shall in no event exceed the amount which would produce that Normal Retirement Benefit to which such Participant would have been entitled had he not again become an Employee following such Separation from the Service. For any Participant for whom the Primary Insurance Amount cannot be ascertained as herein provided, said amount shall be that amount which the Administrator shall reasonably estimate. The Primary Insurance Amount determined herein for any Participant will be adjusted to reflect the actual salary history for years previously estimated before his Separation from the Service if the Participant supplies documentation of that history. Such documentation must be provided no later than a reasonable period of time following the later of the date of his Separation from the Service and the time the Participant

is notified of the Benefit to which he or she is entitled. No Benefit hereunder shall be decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act or any increase in the wage base under such Title II, if such increase take place after September 2, 1974, or (if later) the earlier of the date of first receipt of such Benefits or the date of Separation from the Service of the Participant to whom or with respect to whom such Benefits are paid, as the case may be.

Section 1.46 - Rules of the Plan

"Rules of the Plan" means rules and regulations of interpretation, administration, and application of the Plan, as properly established and consistently applied by the Administrator.

* * * *

Section 1.49 - Trust

"Trust" means the trust established pursuant to the Trust Agreement.

Section 1.50 - Trust Agreement

"Trust Agreement" means that certain Trust Agreement pursuant to Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan, as it may be amended from time to time, providing for the investment and administration of the Trust Fund. By this reference, the Trust Agreement is incorporated herein.

* * * *

Section 1.52 - Trust Fund

"Trust Fund" means the fund established under the Trust Agreement by contributions made by the Companies and Participants pursuant to the Plan and from which any distributions under the Plan are to be made.

* * * *

Section 1.54 - Vested

"Vested" means nonforfeitable except to the extent provided in Sections 4.14 and 4.18.

Section 1.55 - Vested Retirement Benefit

"Vested Retirement Benefit" shall have the meaning given in Section 4.15.

* * * *

ARTICLE II

ELIGIBILITY

Section 2.1 - Requirements for Participation

(a) Effective January 1, 1980 any person who was a Participant in the Hughes Retirement Plan on December 31, 1979 and not employed in a bargaining unit covered by a collective bargaining agreement shall remain a Participant until Section 2.4 or 2.5 applies to him.

(b) Any other Employee who

(i) had not attained the age of sixty-four years and six months on last becoming an Employee, and

(ii) has completed either

a a twelve-month period commencing with

1 his first Hour of Service since the date he was hired as an Employee of his Company (whether or not then a Company), or

2 his Anniversary Date

in which period he had completed one thousand (1,000) or more Hours of Service, or

b twelve months of Company Service, and

(iii) is not an Employee in a bargaining unit covered by a collective bargaining agreement with respect to which retirement benefits were the subject

of good faith bargaining (unless such agreement provides for coverage hereunder of Employees in such unit), and

(iv) is not a Sales Representative of Theta Cable of California, and

(v) is on the United States payroll of his Company (as maintained by such Company in accordance with its established practice), and

(vi) complies with the requirements of Section 2.3,

shall become a Participant after 1979, effective as of the first Monday of the calendar month coincident with or next following his satisfaction such requirements.

(c) Any Participant whose participation is terminated by a Separation from the Service under Section 2.4 shall again become a Participant upon again becoming an Employee and complying with the requirements of paragraphs (iii)-(vi), inclusive, of subsection (b). There shall be no duplication of any previously Accrued Benefits by reason of a Participant's readmission to the Plan.

* * * *

Section 2.5 - Suspension During Continuous Service

A Participant may suspend his participation in the Plan during his Continuous Service at any time by giving such advance written notice to the Administrator as is required under the Rules of the Plan that he declines to make contributions under Section 3.4 for a period of twelve calendar months and thereafter until he again complies with Section 2.3, which notice shall be effective and irrevocable in accordance with its terms upon receipt by the Administrator.

Section 2.6 - Forfeitures

If a Participant has a Separation from the Service for any reason prior to his acquisition of a fully Vested Retirement

Benefit, the unvested portion of his Accrued Benefit Derived from Company Contributions shall be forfeited at the earlier of

(a) if he then has less than five Years of Vesting Schedule Service, that date when the number of his consecutive Break in Service Years equals five,

(b) if he has then had one or more Break in Services Years not followed by a Year of Service, immediately preceding his sixty-fifth birthday, or

(c) if he then has less than five Years of Vesting Schedule Service, his withdrawal of Participant Contributions under Section 3.8(a) provided that any such unvested portion shall be restored subject to subsequent forfeiture under this Section, if, before subsection (a) applies, he restores such withdrawn Contributions with interest under Section 3.8(b).

* * * *

ARTICLE III

FUNDING OF BENEFITS

Section 3.1 - Source of Contributions

The cost of Benefits under the Plan to the extent not provided by contributions of Participants under Section 3.4 shall be provided by contributions of the Companies not less than in such amounts, and at such times, as the Plan Enrolled Actuary shall certify to be necessary, to fund Benefits under the Plan in accordance with the actuarial assumptions selected by such Actuary from time to time in accordance with Section 1.6, and the funding policies and method selected from time to time by the Administrator as permitted by law and, to the extent required by law, with the consent of the Secretary of the Treasury.

Section 3.2 - Limitations

The contribution of a Company to the Trust Fund for any taxable year shall be not less than that amount necessary to

maintain the qualified status of the Plan and Trust, and to comply with all applicable legal requirements.

Section 3.3 - Application of Forfeitures

Forfeitures shall not be applied to increase the Benefits any Participant would otherwise receive under the Plan, and shall be applied to reduce contributions of the Companies.

Section 3.4 - Required Participant Contributions

As a condition of his admission to and continued active participation in the Plan, each Participant, except a Participant on inactive status under Section 2.7, shall contribute to his Participant Contributions Account for each payroll period during his participation in the Plan prior to his Early or Normal Retirement Date, as provided under Rules of the Plan, two percent of the first $3,600 of his Compensation earned in a Plan Year and four percent of such Compensation, if any, in excess of $3,600. A Participant, who is an Employee, except a Participant on inactive status under Section 2.7, receiving Benefits under the Income Insurance Plan shall contribute four percent of his regular pay, including any shift differential and then current cost-of-living allowances for his job classification and regularly-scheduled work-week at the rate in effect on his last day on the job. A Union Officer shall contribute the same amount he would have contributed if he had received the regular wage, including any shift differential and cost-of-living allowances for his job classification and regularly-scheduled work-week, at the rate in effect for the pay period in question, under the then applicable collective bargaining agreement.

Section 3.5 - Withholding of Contributions

A Participant's Contributions to his Participant Contributions Account shall be withheld by the Company for each payroll period from his pay, or shall be paid in cash to the extent of any excess of such contributions over the amount available for withholding, or by the insurer from his benefits under the Income Insurance Plan. A Union Officer shall make such contributions in cash not less often than annually by the

end of the applicable year to the last Company by which he was employed.

Section 3.6 - Deposit of Participant Contributions

A Participant's Contributions shall be transmitted to the Trustee not later than the end of the calendar month following the calendar month in which such contributions are made.

Section 3.7 - Participant Contributions Accounts

The Administrator shall maintain a Participant Contributions Account for each Participant who has made Participant Contributions to the Plan, to which Account shall be credited the balance, if any, in such Account as of December 31, 1975, exclusive of amounts related to Participant Contributions made before a break in Continuous Service commencing before 1976, together with contributions or repayments, if any, under Section 3.4 or 3.8(b), and less withdrawals under Section 3.8(a) and, on the aggregate net amount so credited, interest compounded annually at the rate of 5% per year commencing January 1, 1976.

Section 3.8 - Withdrawals and Repayments

(a) Subject to the provisions of Section 4.12, a Participant who has a Separation from the Service may withdraw in cash the amount referred to in Section 4.2(a)(ii)a upon written notice to the Administrator at any time during a Separation from the Service prior to the Participant's Annuity Starting Date.

(b) A Participant, but not a Former Participant, may within twenty-four months following his first rehire or recall after a withdrawal under subsection (a), and prior to his Annuity Starting Date while employed by the Company, repay to the Trust in full (but not partially) the amount he withdrew under subsection (a) after 1975 (but not earlier), together with interest compounded annually on such amount at the rate referred to in Section 3.7, and shall thereby be restored to the same Accrued Benefit he would have had if no withdrawal had been made after 1975.

(c) Withdrawals from the Plan other than as permitted in subsection (a) are prohibited.

ARTICLE IV

RETIREMENT, TERMINATION, OR DEATH

Section 4.1 - Normal Retirement

A Participant shall be entitled to Normal Retirement Benefits hereunder on his Normal Retirement Date, except as provided in Section 4.7 or 4.9.

Section 4.2 - Normal Retirement Benefit

(a) A Participant who retires on his Normal Retirement Date shall receive a Normal Retirement Benefit, which, subject to the provisions of Sections 4.11 and 4.12, shall consist of

(i) a monthly payment on the first day of each calendar month commencing with his Normal Retirement Date and ending with the last such payment before his death, and

(ii) a payment within five years after his death in a lump sum to this properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of

a the sum, net of any unrepaid withdrawals after 1975 under Section 3.8, of

1 the balance, if any in his Participant Contributions Account on December 31, 1975,

2 his Participant Contributions under Section 3.4 after 1975, and

3 interest compounded annually to the date of his first monthly payment, with proper

allowance for any earlier unrepaid withdrawal under Section 3.8, at the rate of five percent per year on such balance from December 31, 1975, and on such post-1975 Participant Contributions from the end of the Plan Year in which they were credited to his Participant Contributions Account, over

b the aggregate of all payments made to him under paragraph (i).

(b) The monthly Benefit payment described in subsection (a)(i) shall be the greatest of the alternative Benefits determined under Sections 4.3, 4.4 or 4.5, reduced to eliminate the Actuarial Equivalent of any prior forfeitures under Section 2.6 and any prior withdrawals under Section 3.8(a) not repaid under Section 3.8(b), and then adjusted as provided in Section 4.6.

(c) Notwithstanding anything in the Plan to the contrary, in no event shall a Participant's or Former Participant's monthly Benefit under subsection (a)(i), Section 4.8(a)(i), or Section 4.10(a)(i), be less than the largest monthly Benefit under Section 4.8(a)(i), Section 4.8(c), or Section 4.15, if any, to which he could have become entitled at any time by incurring a Separation from the Service.

Section 4.3 - Alternative Formula: Benefit Based on Final Average Monthly Compensation

A Participant's alternative Benefit determined under this Section shall be an amount determined by subtracting

(a) the product of

(i) the factor of .015,

(ii) his Total Benefit Accrual Service (not in excess of 33-1/3 years),

(iii) the factor determined by dividing

a his benefit Accrual Service by

b his Total Benefit Accrual Service, and

(iv) his Primary Insurance Amount, from

(b) the product of

(i) the factor of .01625 (but in the case of Benefits payable to a Participant whose last Separation from the Service was before July 1, 1978, the factor of .015, or whose last Separation from the Service is after December 7, 1980, the factor of .0175),

(ii) his Benefit Accrual Service, and

(iii) his Final Average Monthly Compensation.

Section 4.4 - Alternative Formula: Minimum Benefit

A Participant's alternative Benefit determined under this Section shall be the product of

(a) his Benefit Accrual Service, and

(b) the sum of

(i) $11.00 (but in the case of Benefits payable to a Participant whose last Separation from the Service was after December 3, 1979 and before December 5, 1982, the amount of $9.50; and in the case of Benefits payable to a Participant whose last Separation from the Service was after December 31, 1975 and before December 3, 1979, the amount of $7.00) and

(ii) the product of

a the factor of .005 and

b his Final Average Monthly Compensation.

Section 4.5 - Alternative Formula: Career Average Benefit

A Participant's alternative Benefit determined under this Section shall be the sum of

(a) the product of

(i) the fraction one twenty-fourth (1/24th) and

(ii) the aggregate principal amount of his Participant Contributions under Section 3.4 or its predecessor, net of any unrepaid withdrawals under Section 3.8 and

(b) the amount by which

(i) his Accrued Benefit as of December 31, 1975 (as shown on the Administrator's records) exceeds

(ii) one twenty-fourth (1/24th) of the aggregate principal amount of his Participant Contributions determined as of such date.

Section 4.6 - Cost of Living Adjustments

(a) The monthly Benefit payable under Sections 4.2(a)(i), 4.8(a)(i) or 4.10(a)(i) to or in respect of a Participant during any Plan Year (the "subject Plan Year") after the first Plan Year in which monthly Benefits were so payable shall be adjusted by multiplying the monthly Benefit so payable during the Plan Year immediately preceding the subject Plan Year (after application of this Section 4.6 to such preceding Plan Year) by a factor (not over 1.040 and not under 0.960) computed to three decimal places, determined by dividing

(i) the United States Bureau of Labor Statistics Consumer Price Index (All Urban Consumer, all items, United States city average, 1967 = 100) as revised, for the September next before the subject Plan Year

by

(ii) such Index for the September of the second year before the subject Plan Year.

(b) Notwithstanding the provisions of subsection (a), the adjustment provided in such subsection shall not result in a monthly Benefit less than the monthly Benefit initially payable to or in respect of the Participant.

(c) If the Plan is terminated under Section 6.1, no further adjustments shall be made under this Section 4.6,

except as to Former Participants who had retired under Section 4.1, the first sentence of Section 4.7, or 4.10 (but not Section 4.15) on or prior to the date of such termination.

(d) No adjustment shall be made under this Section 4.6 to a Benefit payment described in Section 4.2(a)(ii).

Section 4.7 - Early Retirement

A Participant or a Former Participant who has a Separation from the Service on or after his fifty-fifth birthday may voluntarily retire on his Early Retirement Date upon written notice to the Administrator designating such Date and his Benefit shall be determined under Section 4.8. A Former Participant who has a Separation from the Service before his fifty-fifth birthday may elect Early Retirement in accordance with this Section, effective on or after his fifty-fifth birthday. The designated effective date of such election shall be his Early Retirement Date, and his Benefit shall be determined under Section 4.15.

Section 4.8 - Early Retirement Benefit

(a) Participant who retires on his Early Retirement Date shall receive an Early Retirement Benefit which, subject to the provisions of Sections 4.6, 4.7, 4.11 and 4.12, shall consist of

(i) a monthly payment on the first day of each calendar month commencing with his Early Retirement Date and ending with the last such payment before his death, and

(ii) a payment within five years after his death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of

a the sum referred to in Section 4.2(a)(ii)a, over

b the aggregate of all payments made to him under paragraph (i).

(b) The amount of each such monthly payment, except as provided in subsection (c), Sections 4.2(c) and 4.6, shall be equal to the excess, expressed in terms of a monthly payment, of the Actuarial Equivalent of his Vested Accrued Benefit computed without regard to Section 4.6 over the Actuarial Equivalent of his Benefit under subsection (a)(ii).

(c) In the case of a Participant on the United States payroll not on inactive status under Section 2.7(a)(i), the sum of whose full years of Continuous Service on his Early Retirement Date and age in years as of his last birthday coinciding with or preceding such Date equals or exceeds seventy-five, the amount of each such monthly payment shall be equal to the monthly payment (including adjustments under Section 4.6) included in his Accrued Benefit. Solely for purposes of this subsection (c), in order to comply with Revenue Ruling 71-446, the Total Benefit Accrual Service taken into account in applying Section 4.3(a)(ii) shall not exceed the number of years which, multiplied by the fraction, the numerator of which is Total Benefit Accrual Service and the denominator of which is described in Section 1.3(b)(i), equals 24-2/3 if his age at his nearest birthday is 55, or 26-1/3 if such age is 56.

<u>Section 4.9</u> - <u>Late Retirement</u>

A Participant shall be entitled to a Late Retirement Benefit hereunder on his Late Retirement Date, or on his Annuity Starting Date if occurring later than his Normal Retirement Date.

<u>Section 4.10</u> - <u>Late Retirement Benefit</u>

(a) A Participant who retires on his Late Retirement Date, or who elects an Annuity Starting Date occurring later than his Normal Retirement Date, shall receive a Late Retirement Benefit which, subject to the provisions of Sections 4.6, 4.11 and 4.12, shall consist of:

(i) a monthly payment on the first day of each calendar month commencing with his Annuity Starting Date, which would be his Late Retirement Date if no election to defer the Annuity Starting Date is made, and ending with the last such payment before his death, and

(ii) a payment within five years after his death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of

<u>a</u> the sum referred to in Section 4.2(a)(ii)<u>a</u>, over

<u>b</u> the aggregate of all payments made to him under paragraph (i).

(b) To the amount of each monthly payment determined in Section 4.2(a)(i), shall be added the excess, expressed in terms of a monthly payment, of the Actuarial Equivalent of the Normal Retirement Benefit he would have received under Section 4.2(a)(i) (computed without regard to Section 4.2(c) but after application of Section 4.6 and after application of an interest rate equal to 9% per annum (or at such time as the interest rate determined under Section 1.6(a) is equal to or greater than 9%, then such interest rate determined under Section 1.6(a)), had he retired upon his Normal Retirement Date.

<u>Section 4.11</u> - <u>Optional Retirement Benefit</u>

A Participant entitled to receive a Normal, Early, or Late Retirement Benefit shall receive the joint and survivor annuity provided in Section 4.12 (if such Section applies to him) unless he elects not to receive such annuity and elects instead to receive a distribution in accordance with subsection (a), (b), (c) or (d). A Participant to whom Section 4.12 does not apply and who makes no election under this Section shall receive a Benefit in accordance with subsection (a). A participant may not make or change an election hereunder after his Annuity Starting Date. A Participant may elect, in accordance with

Rules of the Plan, to receive his Benefit in any one of the following manners:

(a) a Normal, Early or Late Retirement Benefit, as the case may be,

(b) a Benefit consisting of

(i) monthly payments commencing on his Annuity Starting Date to the Participant for his life, and monthly payments to his Beneficiaries or his Contingent Annuitants for life (in amounts as selected by the Participant equal to a survivor annuity of 50%, 66-2/3%, 75% or 100% of the monthly amount paid to such Participant) or in a manner similar to that provided under any other generally available form of fixed annuity contract, and adjusted in the manner provided in Section 4.6, all as determined under Rules of the Plan, and

(ii) upon the death of the Participant, and his Contingent Annuitant (if any) or primary Beneficiaries (if any), payment to the Participant's duly designated secondary Beneficiary or Beneficiaries in cash in a lump sum an amount equal to the excess, if any, of

a the sum described in Section 4.2(a)(ii)a over

b the aggregate of all payments made under paragraph (i),

provided no such Beneficiary or Contingent Annuitant (other than a spouse) can receive more than forty-nine percent (49%) of the Actuarial Equivalent of the Participant's monthly Normal, Early or Late Retirement Benefit as the case may be, or

(c) a Benefit consisting of

(i) a reduced monthly payment commencing on his Annuity Starting Date payable during the Benefit period described in Section 4.2(a)(i) with a temporary additional Benefit payable during the period from his

Separation from the Service through the earlier of the month in which he dies or the month before his sixty-second or sixty-fifth birthday, as he shall elect, in an amount equal to his monthly Social Security old age benefits payable at such birthday as projected under Rules of the Plan, and all adjusted in the manner provided in Section 4.6, and

(ii) a payment within five years after his death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of

a the sum described in Section 4.2(a)(ii)a, over

b the aggregate of all payments made under paragraph (i).

(d) The option provided in subsection (c) may be elected either coupled with, or independently of, the standard joint and survivor annuity provided under Section 4.12, but may not, without the consent of the Administrator, be coupled with any option provided in subsection (b).

(e) If a Participant dies before his entire interest has been distributed to him or if a distribution has been commenced in accordance with Section 4.11 to his surviving spouse and such surviving spouse dies before his entire interest has been distributed to such surviving spouse, then his entire Benefit (or the remaining part thereof) shall be distributed within five years after his death (or the death of his surviving spouse). The preceding shall not apply if the distribution of the interest of the Participant has commenced and such distribution is for a term certain over a period permitted under Section 4.11.

Section 4.12 - Joint and Survivor Annuity

(a) Notwithstanding anything in the Plan to the contrary, the Benefit, if any, of a Participant or Former Participant commencing on his Annuity Starting Date shall be a joint and survivor annuity, as described in subsection (b), if

(i) he was married on his Annuity Starting Date, and

(ii) he has not otherwise elected under subsection (f).

(b) The joint and survivor annuity of a Participant or Former Participant shall be a Benefit, reduced as provided in subsection (c) and adjusted in the manner provided in Section 4.6, consisting of

(i) monthly payments to him beginning on his Annuity Starting Date and ending with the calendar month in which his death occurs with the provision that, if he dies after his Annuity Starting Date survived by the spouse to whom he was married on his Annuity Starting Date, such spouse shall receive monthly payments of fifty percent of such reduced Benefit adjusted in the manner provided in Section 4.6, beginning on the first day of the calendar month next following his death and ending with the calendar month in which such spouse dies, plus

(ii) as soon as both such Participant and his surviving spouse are dead, a lump sum payment to the Participant's properly designated Beneficiary or Beneficiaries other than such spouse, in an amount equal to the excess, if any, of

a the sum referred to in Section 4.2(a)(ii)a over

b the aggregate of all payments made under this subsection to the Participant and his spouse.

(c) The reduced Benefit payable under this Section to a Participant or Former Participant during his lifetime shall be at a monthly rate such that his joint and survivor annuity is the Actuarial Equivalent of his Early, Normal or Late Retirement Benefit.

(d) Within a reasonable period of time before the applicable election period, each Participant or Former Participant who may be affected by this Section shall be furnished, by mail or personal delivery, with a written explanation of

(i) a general description of the terms and conditions of the joint and survivor annuity available under this Section and the survivor annuity available under Section 4.14(c), (d) and (e), and the circumstances under which the Benefit will be so paid,

(ii) the availability of the election described in subsection (f), and the effect of such an election,

(iii) the rights of the Participant's spouse under subsection (f), and

(iv) the right of a Participant to revoke a previous election under subsection (f) and the effect of such revocation.

(e) The applicable election period under subsection (d) shall be:

(i) for the joint and survivor annuity available under this Section, the ninety day period ending on the Annuity Starting Date, and

(ii) for the early survivor annuity available under Section 4.14(c), (d), and (e), the period which begins on the first day of the Plan Year in which the Participant attains age 35, or, if earlier, the date of the Participant's Separation from the Service, and ends on the date of the Participant's death.

(f) A Participant or Former Participant referred to in subsection (a) may elect in writing, in the manner prescribed by the Administrator, not to receive a joint and survivor annuity (in which case he shall receive his Benefit as otherwise provided in the Plan). Such an election shall be made not later than his Annuity Starting Date.

(g) The Administrator shall, if necessary, delay the commencement of a Participant's or Former Participant's Benefit until the close of the election period referred to in subsection (f), but shall make payments retroactive to his Annuity Starting Date.

(h) During the period described in subsection (f), a Participant or Former Participant who properly elected thereunder not to receive a joint and survivor annuity may revoke such election and after any such revocation, an election under subsection (f) may be made again prior to the expiration of such election period.

(i) Any election made under subsection (f) or Section 4.14(a) will be effective only if the Participant or Former Participant's spouse signs a written consent and the spouse's signature is witnessed by a Plan representative or Notary Public. If the Participant or Former Participant establishes to the satisfaction of the Administrator that such a written consent cannot be obtained because the spouse cannot be located, the election will be deemed to be effective without the written consent of the spouse.

<u>Section 4.13</u> - <u>Actuarial Equivalence</u>

The Participant's Optional Retirement Benefit under Section 4.11 or the Benefit provided under Section 4.12 shall, except as provided in Section 4.15, be the Actuarial Equivalent of his Early, Normal, or Late Retirement Benefit, such Equivalent being computed as of his Annuity Starting Date.

<u>Section 4.14</u> - <u>Death Benefit</u>

(a) If a Participant or Former Participant dies prior to the due date of the first monthly Benefit payment payable to him under the Plan, and if the other subsections of this Section are not applicable or if the Participant or Former participant has elected not to receive the benefit under subsection (b) or (e), in writing in the manner prescribed by the Administrator, and if the Participant's spouse has consented to such election in accordance with Section 4.12(i), there shall be paid in cash in

a lump sum to his properly designated Beneficiary or Beneficiaries an amount equal to the balance of his Participant Contributions Account and all his other Benefits (if any) shall be forfeited.

(b) Unless the election in Section 4.14(a) is made, if a Participant's age is 55 or older, has a Separation from the Service due to his death, or has a Separation from the Service because of retirement but dies prior to the first day of the month coinciding with or next following retirement within which the initial payment of any benefit is or would be payable to him, and leaves a surviving spouse, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall in accordance with Rules of the Plan elect to receive either the Benefit described in subsection (c) or the Benefit described in subsection (d). In the event benefits are paid under this subsection, then no beneficiary (other than the spouse if so designated) shall be entitled to receive benefits under the Plan, except as provided in subsection (c)(ii).

(c) The Benefit described in this subsection shall consist of

(i) a monthly payment to such spouse on the first day of each calendar month commencing with the month following the month of such Participant's death, and continuing through the month of such spouse's death, in an amount equal to the monthly Benefit which such spouse would have received under Section 4.11(b)(i) had the Participant retired immediately prior to his death and elected under Section 4.11(b) to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be, in the form of a fixed annuity contract subject to adjustment in the manner provided in Section 4.6, naming such spouse as Contingent Annuitant and providing that such monthly payments to the surviving Contingent

Annuitant after the Participant's death should be equal to the payments to the Participant during his life, subject to adjustment in the manner provided in Section 4.6, and

(ii) upon the death of such spouse, payment in cash in a lump sum to such Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of

a the sum described in Section 4.2(a)(ii)a over

b the aggregate of all payments made under paragraph (i).

(d) The Benefit described in this subsection shall consist of

(i) a lump sum payment payable not later than the end of the Plan year following the Plan Year of the death of such Participant to the surviving spouse in an amount equal to the sum referred to in Section 4.2(a)(ii)a, and

(ii) a monthly payment, adjusted in the manner provided in Section 4.6, on the first day of each calendar month commencing with the month following the month of such Participant's death, and ending with the month of such spouse's death, in an amount Actuarially Equivalent as so adjusted to the sum of

a the Participant's Accrued Benefit Derived from Company Contributions, and

b an amount Actuarially Equivalent to the excess, if any of his Accrued Benefit Derived from Participant Contributions over the Benefit provided for under this subsection (d) as computed without regard to this subparagraph b.

(e) Unless the election in Section 4.12(f) or in Section 4.14(a) is made, or unless the provisions of Section 4.14(b)

apply, if a Participant dies with a Vested Retirement Benefit or if a Former Participant dies with a Vested Retirement Benefit after a Separation from the Service, and such death is prior to the due date of the first monthly Benefit payable to him under the Plan and if he is survived by the spouse to whom he was married throughout the three hundred and sixty-five day period immediately preceding his death, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall receive a survivor annuity. The survivor annuity shall be a monthly payment commencing on the first day of the calendar month following the month in which the Participant or Former Participant dies or would have attained his earliest retirement age, whichever is later, and ending with the calendar month in which the spouse dies, consisting of:

(i) if the Former Participant dies after his earliest retirement age, a monthly payment equal to 50% of the monthly amount the Former Participation would have received had he retired on the day before death occurred and was entitled to a joint and survivor annuity under Section 4.12; or

(ii) if the Participant or Former Participant dies prior to his earliest retirement age, a monthly payment equal to 50% of the monthly amount the Participant or Former Participant would have received if he retired electing a joint and survivor annuity under Section 4.12, and if such Participant had:

a a Separation from the Service on the date of death,

b survived to the earliest retirement age,

c retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and

d died on the day after the day on which such Participant would have attained the earliest retirement age, and

e in the case of an individual who has a Separation from the Service before the date of such individual's death, subparagraph a shall not apply; plus

(iii) upon the death of such spouse, payment shall be made in cash in a lump sum to such Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of

a the sum described in Section 4.2(a)(ii)a over

b the aggregate of all payments made under subsection (e).

(f) Subsection (e) shall apply only if:

(i) a Participant has at least one Hour of Service with the company on or after August 23, 1984; or

(ii) a participant has at least one Hour of Service on or after January 1, 1976, and when such Participant incurred a Separation from the Service he had ten or more Years of Vesting Schedule Service; or

(iii) a Participant who has an Hour of Service on or after September 2, 1974 was employed by the Company after the earliest date on which such Participant was eligible for early retirement benefits under the Plan; and

(iv) such Participant dies after August 23, 1984 prior to reaching his Annuity Starting Date.

Section 4.15 - Vested Retirement Benefit

Each Participant shall be entitled to a Vested Retirement Benefit in the amount provided in this Section. In the event of his Separation from the Service prior to his Normal Retirement Date, except as provided in Sections 4.8 and 4.14, such Participant shall upon his Normal Retirement Date become entitled to a Normal or Optional Retirement Benefit, or upon his Early Retirement Date may receive an Early or Optional Retirement Benefit, as he shall elect, or in the absence of such election, as determined in the manner of Sections 4.2, 4.8, 4.11 and 4.12, but, in each case, if his Separation from the Service preceded his fifty-fifth birthday, without regard to Sections 4.6 and 4.8(c), all in an amount Actuarially Equivalent to the sum of

(a) his Accrued Benefit Derived from Participant Contributions, and

(b) that percentage of his Accrued Benefit Derived from Company Contributions determined on the basis of his Years of Vesting Schedule Service as follows:

Years of Vesting Schedule of Service		Vested Percentage
Less than	5	0%
	5	50%
	6	60%
	7	70%
	8	80%
	9	90%
	10 (or more)	100%

A Participant's Vested Retirement Benefit shall in no event be diminished because of any subsequent reductions in his Vesting Schedule Service. A Participant's Accrued Benefit to the extent not forfeited under Section 2.6 or 4.14(a) shall

become 100% Vested (if he is then employed by a member of the Controlled Group) on his sixty-fifth birthday.

Section 4.16 - Limitation on Benefits

(a) Notwithstanding any other provisions of the Plan, for the Plan Year commencing January 1, 1983, in no event may that portion of a Participant's Benefit paid in any one Plan Year (which shall be the limitation year of the Plan) under this Plan and the Hughes Bargaining Retirement Plan and not attributable under Regulations of the Secretary of the Treasury or his delegate to his Participant Contributions exceed an amount Actuarially Equivalent to a benefit payable annually in the form of a straight life annuity (with no ancillary benefits) in the greater of (i) or (ii) below, where

(i) is $90,000.00; and where

(ii) is 100% of the Participant's average Compensation for the three consecutive calendar years while participating in the Plan in which the Participant's Compensation was highest.

(b) If the retirement Benefit under the Plan commences before age 62, the maximum annual benefit described in paragraph (i) shall be reduced actuarially, using an interest rate which is the greater of 5% or the rate described in Section 1.6 used to determine the Actuarial Equivalent of the Early Retirement Benefit, for each year prior to age 62 down to age 55, but in no event lower than $75,000.00. As of January 1 of each calendar year, the dollar limitation of paragraph (i) will be changed as determined by the Commissioner of Internal Revenue for that calendar year and will become effective as the maximum annual benefit for the Plan for that year. The maximum annual benefit for a calendar year applies to limitation years ending with or within that calendar year.

(c) Except as provided in the following sentence, which imposes additional limitations on the amounts payable to Participants who have been employed by the Company for less than ten years, the foregoing limitations shall not be applicable

with respect to any Participant whose annual Benefit is less than $10,000.00, except with respect to a Participant who is or has ever been covered by a defined contribution plan maintained by the Company. If, at retirement, a Participant has been employed by the Company for less than ten years, the applicable maximum shall be multiplied by a fraction, the numerator being his years employed and the denominator being ten.

(d) If the Participant's Benefit payable under this Plan is payable in a form other than a benefit payable on a straight life annuity or a qualified joint and survivor life annuity, the Benefit shall be the Actuarial Equivalent of the straight life annuity.

(e) Notwithstanding the provisions of subsection (a), the maximum annual benefit shall not be less than the Participant's Accrued Benefit for the Plan Year ending December 31, 1982.

(f) In the case of any Employee who is a Participant in this Plan and in any defined contribution plan of the Company, the sum of the defined benefit plan fraction and the defined contribution plan fraction for any year shall not exceed 1.0. In the event the sum of such fractions exceeds 1.0, the Committee shall prescribe the manner in which the annual benefits to this Plan or the annual addition under the Company's defined contribution plans, if any, shall be reduced in order that no plans shall be disqualified under applicable sections of the Internal Revenue Code.

(g) For purposes of applying the limitations of subsection (f), the following definitions shall apply:

(i) The term "defined benefit plan fraction" shall mean a fraction the numerator of which is the projected annual benefit payable under this Plan or any other defined benefit plan of the Company (determined as of the close of the limitation year), and the denominator of which is the lesser of the product of 1.25 multiplied by the dollar limitation in effect under Section 415(b)(1)(A) of the Code

for such year, or the amount of the Participant's Compensation multiplied by 1.4.

(ii) The term "defined contribution plan fraction" shall mean the aggregate annual additions to all of the Company's defined contribution plans (whether or not terminated) determined as of the close of the limitation year without regard to limitations on contributions over the sum of the lesser of the following amounts determined for such year and for each prior year of service with the Company: the dollar limitation in effect under Section 415(c)(1)(A) of the Code for such year (determined without regard to Section 415(c)(6) of the Code) multiplied by 1.25, or 35% of the Participant's Compensation determined for such year.

(iii) For purposes of subsection (a)(ii), Compensation means a Participant's earned income, wages, salaries, and fees for professional services, and other amounts received for personal services actually rendered in the course of employment with the Company (including, but no limited to, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips and bonuses), and excluding the following:

a Company contributions to a plan of deferred compensation which are not included in the Participant's gross income for the taxable year in which contributed or Company contributions under a simplified employee pension plan to the extent such contributions are deductible by the Participant, or any distributions from a plan of deferred compensation;

b Amounts realized from the exercise of a nonqualified stock option, or when restricted stock (or property) held by the Participant either becomes freely transferable or is no longer subject to a substantial risk of forfeiture;

c Amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option; and

d Other amounts which received special tax benefits, or contributions made by the Company (whether or not under a salary reduction agreement) towards the purchase of an annuity described in Section 403(b) of the Code (whether or not the amounts are actually excludable from the gross income of the Participant.)

* * * *

ARTICLE V

ADMINISTRATIVE PROVISIONS

Section 5.1 - Administrative Duties and Powers of the Administrator

The Administrator shall conduct the general administration of the Plan in accordance with the Plan and shall have all the necessary power and authority to carry out the function including the following powers and authority:

(a) To determine questions of eligibility of Participants and the entitlement to Benefits of Participants, Former Participants, Beneficiaries, Contingent Annuitants and all other persons.

(b) As required by law, to engage and designate the Plan Enrolled Actuary, a qualified public accountant meeting the requirements of Section 103(a)(3)(D) of ERISA, and other actuaries, accountants, attorneys, appraisers, brokers, consultants, administrators, physicians or other persons and (with the Companies and their officers, directors and employees) to rely upon the advice, opinions or valuations of any such persons and, except as required by law, be fully protected in acting or relying thereon in good faith.

(c) To adopt such Rules of the Plan, as are not inconsistent with the Plan or applicable law, and to amend or revoke any such Rule.

(d) To interpret the Plan and any Rules of the Plan adopted under subsection (c).

(e) To conduct claims procedures as provided in Section 5.11.

(f) To delegate any power or duty to any other person or persons including a committee appointed pursuant to Section 5.3.

(g) To impose a reasonable charge to cover the cost of furnishing to Participants or Beneficiaries upon their written request documents as required under Section 104(b)(4) of ERISA (but not for furnishing information, statements or documents as required by Section 104(b) (1), (2), (3) or Section 104(c) or Section 105(a) or (c) of ERISA).

(h) To exercise any powers delegated to the Administrator by the Trust Agreement.

<u>Section 5.2</u> - <u>Limitations Upon Powers of the Administrator</u>

The Plan shall not be operated so as to discriminate in favor of Participants who are officers or shareholders or who are highly compensated. The Plan shall be uniformly and consistently interpreted and applied with regard to all participants in similar circumstances. The Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purposes of the Plan.

<u>Section 5.3</u> - <u>Administrative Committee</u>

HUGHES AIRCRAFT COMPANY may, but need not, appoint an Administrative Committee consisting of one or more members appointed by and holding office during HUGHES AIRCRAFT COMPANY'S pleasure, to function as specified under Section 1.7.

* * * *

<u>Section 5.10</u> - <u>Effect of Administrator Action</u>

Except as provided in Section 5.11, all actions taken and all determinations made by the Administrator in good faith shall be final and binding upon all Participants, Former Participants, the Trustee, and any person interested in the Plan or the Trust Fund.

<u>Section 5.11</u> - <u>Claims Procedure</u>

(a) A claim by a Participant, Former Participant, Beneficiary or any other person shall be presented in writing within the maximum time permitted by law or under the regulations of the Secretary of the Treasury pertaining to claims procedures. Such claim shall be presented to a "claims recipient" who shall be the President of the Company in question unless the claimant is employed by the HUGHES AIRCRAFT COMPANY, in which case the claims recipient shall be the Manager, Employee Benefits, Corporate Industrial Relations of the HUGHES AIRCRAFT COMPANY.

(b) The claims recipient shall, within a reasonable time, consider the claim and shall issue his determination thereon in writing.

(c) If the claim is granted, the appropriate distribution or payment shall be made from the Trust Fund or by the Company.

(d) If the claim is wholly or partially denied, the claims recipient shall, within a reasonable time, provide the claimant with written notice of such denial, setting forth, in a manner calculated to be understood by the claimant:

(i) The specific reason or reasons for such denial;

(ii) Specific references to pertinent Plan provisions on which the denial is based;

(iii) A description of any additional material or information necessary for the claimant to perfect the claim

and an explanation of why such material or information is necessary; and

(iv) An explanation of the Plan's claim review procedure.

(e) The claims recipient shall provide each claimant with a reasonable opportunity to appeal a denial of a claim by the claims recipient for a full and fair review by an appeals board. The appeals board shall be appointed and relieved by the officers of the HUGHES AIRCRAFT COMPANY and shall consist of not less than three corporate officers of the HUGHES AIRCRAFT COMPANY. The claimant or his duly authorized representative

(i) May request a review upon written application to the appeals board (which shall be filed with his Company),

(ii) May review pertinent documents, and

(iii) May submit issues and comments in writing.

(f) The appeals board may establish such time limits within which a claimant may request review of a denied claim as are reasonable in relation to the nature of the Benefit which is the subject of the claim and to other attendant circumstances but which, in no event, shall be less than sixty days after receipt by the claimant of written notice of the denial of his claim.

(g) The decision by the appeals board upon review of a claim shall be made not later than sixty days after receipt by the Company of the request for review, unless special circumstances require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than one hundred twenty days after receipt of such request for review.

(h) The decision on review shall be in writing and shall include specific reasons for the decision written in a manner calculated to be understood by the claimant and specific

references to the pertinent Plan provision on which the decision is based.

(i) To the extent permitted by law the decision of the claims recipient (if no review is properly requested) or the decision of the appeals board on review, as the case may be, shall be final and binding on all parties, if warranted on the record and reasonably based on the law and the provisions of the Plan and the Trust Agreement.

ARTICLE VI

MISCELLANEOUS PROVISIONS

Section 6.1 - Termination of Plan

While the Plan is intended as a permanent program, a Company shall have the right at any time to declare the Plan terminated as to it or to discontinue its contributions to the Plan. In the event of such termination or discontinuance, or in the event of partial termination or discontinuance to the extent applicable to the Participants affected thereby, the rights of all Participants in the employ of such Company to their Accrued Benefits, to the extent then funded, shall thereupon vest in full, subject to the order of priority set forth below. In the event of complete termination or discontinuance, the Administrator shall direct the Trustee to make a prompt determination of the fair market value of the Trust Fund and subject to the provisions of Section 6.7(c), the proportionate amount thereof shall then be applied so as to provide (to the extent not already provided) Benefits in said order of priority, satisfying the requirements of each class in full before proceeding to the next class. Benefits for affected Participants shall be computed on the basis of Compensation received prior to the date of said termination or discontinuance and the funds then available, and proportionately reducing Benefits within the class as to which funds are inadequate to provide Benefits in full, and such amounts when determined shall remain fixed regardless of any person's employment status thereafter. Subject to the

provisions of Section 6.7(c), such allocation shall be as follows:

(a) To provide Benefits under Section 4.2 or 4.12 to each Participant, Former Participant, Contingent Annuitant, or Beneficiary in an amount equal or Actuarially Equivalent to the Participant's unpaid Accrued Benefit Derived from Personal Contributions. For all purposes of this section, cash payment may be made if so determined by the Administrator without election by the Participant or limit on amount.

(b) To so provide all such Benefits payable as monthly payments in excess of amounts determined under subsection (a)

(i) Which were in pay status as of the beginning of the three-year period ending on the date of such termination or discontinuance as designated by the Administrator, in a manner not inconsistent with applicable law and regulations, based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such Benefit would be the least, with the lowest Benefit in pay status during such three-year period considered the Benefit in pay status, and

(ii) Which would have been in pay status as of the beginning of such three-year period if the Participant had retired prior to the beginning of such three-year period and if his Benefit had commenced as a Normal Retirement Benefit under Section 4.2 as of the beginning of such period, to each such Benefit based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such Benefit would be the least.

(c) To so provide

(i) All other Benefits (if any) of individuals under the Plan guaranteed under Title IV of ERISA

(determined without regard to Section 4022(b)(5) thereof),

(ii) The additional Benefits (if any) which would be determined under clause (i) if Section 4022(b)(6) of ERISA did not apply.

(d) To so provide all other Benefits under the Plan to the extent Vested without regard to this Section.

(e) To so provide all other Benefits under the Plan.

<u>Section 6.2</u> - <u>Suspension of Contributions</u>

A Company shall have the right to suspend its contributions to the Plan at any time for a fixed period of time, and such period may be extended by subsequent actions of such Company. Such suspension shall automatically become a discontinuance of contributions as under Section 6.1 at any time at which in the opinion of the Plan Enrolled Actuary such suspension affects the benefits to be paid or made available under the Plan. No such suspension shall be allowed to create an "accumulated funding deficiency" under Section 302(a)(2) of ERISA, unless the Plan is then terminated under Section 6.1; provided that in the event of an unintentional creation of an accumulated funding deficiency, the Companies shall have ninety (90) days after such a deficiency is finally determined to correct it without such termination. In the event of such suspension, the Plan shall otherwise remain in full force and effect.

<u>Section 6.3</u> - <u>Limitation on Rights of Participants</u>

The Plan is strictly a voluntary undertaking on the part of the Companies and shall not constitute a contract between any Company and any Participant, or consideration for, or an inducement or condition of, the employment of a Participant. Nothing contained in the Plan shall give any Participant the right to be retained in the service of a Company or to interfere with or restrict the right of the Companies, which is hereby expressly reserved, to discharge or retire any Participant,

except as provided by law, at any time with or without cause. Inclusion under the Plan will not give any Participant any right or claim to a retirement income or any other Benefit hereunder except to the extent such right has specifically become fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee or he is entitled to benefits payments from the Pension Benefit Guaranty Corporation. The doctrine of substantial performance shall have no application to Participants. Each condition and provision, including numerical items, has been carefully considered and constitutes the minimum limit on performance which will give rise to the applicable right.

* * * *

Section 6.5 - Amendment of Plan

(a) As limited by the Trust Agreement, Sections 6.1 and 6.2 of the Plan and any applicable law, the Plan may be wholly or partially amended or otherwise modified retroactively or prospectively from time to time by the Board. No amendment which changes the duties or powers of the Trustee shall be adopted without its approval

(b) No amendment shall be made at any time under which any part of the Trust Fund may be diverted to purposes other than for the exclusive benefit of Participants and their Beneficiaries or which shall decrease the percentage or amount of the interest of any Participant which shall theretofore have become Vested, or which shall decrease his Accrued Benefit.

(c) Notwithstanding anything herein to the contrary, this Plan may be amended prospectively or retroactively at any time by the Company or its duly authorized representative, upon reasonable notice to the Trustee, if deemed necessary to conform to the provisions and requirements of ERISA or the Internal Revenue Code or regulations promulgated pursuant thereto in order to maintain the tax-exempt status hereof thereunder, or to conform to the provisions and requirements

of any law, regulation, order or ruling affecting the character or purpose of the Plan.

* * * *

Section 6.7 - Consolidation or Merger

(a) In the event of the consolidation or merger of a Company with or into any other corporation, or the sale by a Company of its assets, the resulting successor may continue the Plan by adopting the same by resolution of its board of directors and by executing proper supplemental agreements with the Trustee and, if necessary, the Insurance Company. If within ninety (90) days from the effective date of such consolidation, merger or sale of assets, such new corporation does not adopt the Plan, the Plan shall be terminated as to it in accordance with Section 6.1.

(b) There shall be no merger or consolidation with, or transfer of assets or liabilities of the Plan to any other Plan unless each Participant in this Plan would (if the combined or successor plans were then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the Benefit he would have been entitled to receive under this Plan immediately before the merger, consolidation or transfer (if the Plan had then terminated).

(c) Any Company which adopts this Plan after December 31, 1975 and which has maintained a predecessor plan shall adopt this Plan as a separate, and not a merged or combined Plan as to such Company for purposes of Sections 414(b) and 401(a)(12) of the Internal Revenue Code, and Section 208 of ERISA, and the Trustee shall maintain in a separate subfund all assets acquired from such predecessor plan and all subsequent contributions by such Company under Section 3.1, as are actuarially determined to be required with respect to such Company's Employees and Benefit Accrual Service attributable to such Company, and shall pay all Benefits

hereunder to Employees of such Company out of such separate subfund.

* * * *

Section 6.10 - Identification of Fiduciaries

The Administrator and any person or persons (other than an "investment manager" within the meaning of Section 3(38) of ERISA) delegated investment powers by the Administrator shall be named fiduciaries within the meaning of ERISA and, as permitted or required by law, shall have exclusive authority and discretion to control and manage the operation and administration of the Plan within the limits set forth in the Trust Agreement, subject to the proper delegation. The Trustee, each investment manager and every person who exercises any discretionary authority or discretionary control respecting management of the Trust Fund or Plan, or exercises any authority or control respecting the management or disposition of the assets of the Trust Fund or Plan, or renders investment advice for compensation, direct or indirect, with respect to any moneys or other property of the Trust Fund or Plan or has authority or responsibility to do so, or has any discretionary authority or discretionary responsibility in the administration of the Plan, and any person designated by a named fiduciary to carry out fiduciary responsibilities under the Plan, shall be a fiduciary and, as such, shall be subject to the provisions of the Plan, the Trust Agreement, ERISA and other applicable laws governing fiduciaries. Any person may act in more than one fiduciary capacity.

Section 6.11 - Allocation of Fiduciary Responsibilities

(a) Fiduciary responsibilities under the Plan are allocated as follows:

(i) The sole power and discretion to manage and control the Plan's assets including, but not limited to, the power to acquire and dispose of Plan assets, is allocated to the Trustee, except to the extent that another fiduciary is

appointed with the power to control or manage (including the power to acquire and dispose of) assets of the Plan.

(ii) The sole duties, responsibilities and powers allocated to the Board shall be those expressly retained under Section 6.5.

(iii) The sole duties, responsibilities and powers allocated to the Companies shall be those expressly retained under the Plan or the Trust Agreement.

(iv) All fiduciary responsibilities not allocated to the Trustee, the Board, the Companies or any investment manager or other person or persons granted investment powers are hereby allocated to the Administrator, subject to delegation in accordance with Section 5.1(f).

(b) Fiduciary responsibilities under the Plan (other than the power to manage or control the Plan's assets) may be re-allocated among fiduciaries by amending the Plan in the manner prescribed in Section 6.5, followed by such fiduciaries' acceptance of, or operation under, such Amended Plan.

* * * *

Section 6.13 - Governing Law

The Plan and the Trust Agreement shall be interpreted, administered and enforced in accordance with the Internal Revenue Code and ERISA and the rights of Participants, Former Participants, Beneficiaries and all other persons shall be determined in accordance therewith; provided, however, that to the extent that state law is applicable, the laws of the State of California shall apply.

* * * *

Executed at Los Angeles, California, this 30th day of October, 1985.

HUGHES AIRCRAFT COMPANY

By /s/ [illegible]

By /s/ [illegible]

APPROVED:
By /s/ [illegible]
General Counsel
Hughes Aircraft Company

EXHIBIT 2

HUGHES NON-BARGAINING RETIREMENT PLAN

This Hughes Non-Bargaining Retirement Plan executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware, constitutes a restatement as of January 1, 1991, of one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1951, and subsequently amended from time to time thereafter. Each Applicable Exhibit attached hereto is incorporated by reference and forms an integral part of the Plan.

The purposes of the Plan are:

(1) To stimulate and maintain among eligible employees of the Companies, a sense of responsibility, cooperative effort and a sincere interest in the progress and success of the Companies.

(2) To increase the efficiency of such Employees and to encourage them to remain with the Companies until retirement from active service.

The Plan as hereby amended is a qualified pension plan which is intended to comply with the provisions of Section 401(a) of the Code, other applicable provisions of the Code and ERISA. The rights of any person who terminated employment or who retired on or before the effective date of a particular amendment, including his eligibility for benefits and the time and form in which benefits, if any, will be paid, shall be determined solely under the terms of the Plan as in effect on the date of his termination of employment or retirement, unless such person is thereafter reemployed by a Company and again becomes a Participant.

ARTICLE I

DEFINITIONS

*   *   *   *

Section 1.3 - Accrued Benefit

The "Accrued Benefit" of a Participant means the Accrued Benefit as defined in the Applicable Exhibit.

*   *   *   *

Section 1.5 - Administrator

"Administrator" means Hughes acting through its officers or their delegates, and not through its Board of Directors, except that during such time as the Committee is in existence, such Committee shall be the Administrator. The Administrator shall function as provided in the Plan, the Trust Agreement and ERISA.

*   *   *   *

Section 1.8 - Applicable Exhibit

"Applicable Exhibit" means each exhibit attached hereto that by its terms apply to a particular Participant and his Benefit.

*   *   *   *

Section 1.10 - Benefit

The "Benefit" of a Participant means payments payable in the amounts, to the persons, at the times, and over the applicable period (including any final lump-sum payment) specified in Article IV.

*   *   *   *

Section 1.46 - Plan

"Plan" means the Hughes Non-Bargaining Retirement Plan and the Applicable Exhibits as they have been or may be amended from time to time.

*   *   *   *

Section 1.49 - Rules of the Plan

"Rules of the Plan" means rules and regulations of interpretation, administration, and application of the Plan, as properly established and consistently applied by the Administrator.

*   *   *   *

Section 1.53 - Trust

"Trust" means the trust established pursuant to the Trust Agreement.

Section 1.54 - Trust Agreement

"Trust Agreement" means that certain Trust Agreement Pursuant to Hughes Retirement Plans, as it may be amended from time to time, providing for the investment and administration of the Trust Fund. By this reference, the Trust Agreement is incorporated herein.

*   *   *   *

Section 1.56 - Trust Fund

"Trust Fund" means the fund established under the Trust Agreement by contributions made by the Companies to the Plan, and any subfund established in accordance with Section 6.7(c), and from which any distributions under the Plan are to be made.

Section 1.57 - Vested

"Vested" means non-forfeitable when used with reference to a Participant's Benefit, except to the extent provided under the Applicable Exhibit.

ARTICLE II

ELIGIBILITY

Section 2.1 - Requirements for Participation

The requirements for participation are as set forth in the Applicable Exhibit.

* * * *

ARTICLE III

FUNDING OF BENEFITS

Section 3.1 - Source of Contributions

The cost of Benefits under the Plan, to the extent not provided by contributions of Participants if required under the Applicable Exhibit, shall be provided by contributions of the Companies not less than in such amounts, and at such times, as the Plan Enrolled Actuary shall certify to be necessary, to fund Benefits under the Plan in accordance with the actuarial assumptions selected by such Actuary from time to time in accordance with Section 1.4, and the funding policies and method selected from time to time by the Administrator as permitted by law and, to the extent required by law, with the consent of the Secretary of the Treasury.

Section 3.2 - Limitations

The contribution of a Company to the Trust Fund for any taxable year shall be not less than that amount necessary to maintain the qualified status of the Plan and Trust, and to comply with all applicable legal requirements.

Sections 3.3 - Application of Forfeitures

Forfeitures shall not be applied to increase the Benefits any Participant would otherwise receive under the Plan, and shall be applied to reduce contributions of the Companies.

ARTICLE IV

RETIREMENT, TERMINATION OR DEATH

Section 4.1 - Benefits

A Participant shall be entitled to a Benefit upon retirement, termination or death as determined in Article IV as set forth in this Article and the Applicable Exhibit. Except as otherwise provided in the Plan, no interest shall be paid on any Benefit payment received by a Participant or Beneficiary under the Plan.

Section 4.2 - Limitation on Benefits

(a) Notwithstanding any other provisions of the Plan, in no event may that portion of a Participant's Benefit paid in any one calendar year (which shall be the limitation year of the Plan) under this Plan and any other defined benefit plan maintained by the Companies and not attributable under Regulations of the Secretary of the Treasury or his delegate to benefits directly transferred to this Plan from another qualified plan, exceed an amount Actuarially Equivalent to a benefit payable annually in the form of a straight life annuity (with no ancillary benefits) in the lesser of (i) or (ii) below, where

(i) is \$108,963 effective January 1, 1991. Each January thereafter the dollar limitation will be automatically adjusted by multiplying such limit by the cost of living adjustment factor prescribed by the Secretary of the Treasury under section 415(d) of the Code in such manner as the Secretary shall prescribe; and where

(ii) is 100% of the Participant's average Compensation for the three (3) consecutive calendar years while participating in the Plan in which the Participant's Compensation was highest.

(b) If the retirement Benefit commences before the Participant's Social Security Retirement Date but on or after the date the Participant reaches age sixty-two (62), the

maximum annual benefit described in subsection (a) (i) shall be adjusted, in accordance with regulations issued by the Secretary of the Treasury, consistent with the reduction for old-age insurance benefits commencing before Social Security Retirement Date. If the retirement Benefit under the Plan commences before age sixty-two (62), the maximum annual benefit described in subsection (a) (i) determined at age sixty-two (62) as provided herein shall, in accordance with regulations issued by the Secretary of the Treasury, be reduced actuarially to the date the Benefit commences, using an interest rate which is the greater of 5% or the rate described in Section 1.4 used to determine the Actuarial Equivalent of the Early Retirement Benefit. If the retirement Benefit under the Plan commences after the Participant's Social Security Retirement Date, the Benefit may not exceed the dollar limitation described in subsection (a) (i) actuarially adjusted to the Participant's Social Security Retirement Date utilizing an interest rate assumption of the lesser of 5% or the rate described in Section 1.4.

(c) If the Participant has less than ten (10) years of participation in the Plan, the dollar limitation in subsection (a) (i) is reduced by one-tenth for each year of participation (or part thereof) less than ten (10). To the extent provided in regulations or in other guidance issued by the Internal Revenue Service, the preceding sentence shall be applied separately with respect to each change in the benefit structure of the Plan. If the Participant has less than ten (10) Years of Vesting Service with the Company, the amount in subsection (a) (ii) is reduced by one-tenth for each Year of Vesting Service (or part thereof) less than ten (10). The adjustments contained herein shall be applied in the denominator of the defined benefit fraction described in subsection (f) (i) based upon Years of Vesting Service. Years of Vesting Service shall include future years occurring before the Participant's Normal Retirement Date. Such future years shall include the year which contains the date the Participant reaches Normal Retirement Date, only if it can

be reasonably anticipated that the Participant will receive a Year of Vesting Service for such year.

(d) If the Participant's Benefit payable under this Plan is payable in a form other than a benefit payable on a straight life annuity or a qualified joint and survivor life annuity, the Benefit shall be the Actuarial Equivalent of the straight life annuity.

(e) In the case of any Employee who is a Participant in this Plan and in any defined contribution plan of the Company, the sum of the defined benefit plan fraction and the defined contribution plan fraction for any year shall not exceed 1.0. In the event the sum of such fractions exceed 1.0, the Administrator shall prescribe the manner in which the annual benefits to this Plan or the annual addition under the Company's defined contribution plans, if any, shall be reduced in order that no plans shall be disqualified under applicable sections of the Code.

(f) For purposes of applying the limitations of subsection (e), the following definitions shall apply:

(i) the term "defined benefit plan fraction" shall mean a fraction the numerator of which is the projected annual benefit payable under this Plan or any other defined benefit plan of the Company (determined as of the close of the limitation year), and the denominator of which is the lesser of the product of 125% multiplied by the dollar limitation in effect under Section 415 (b) (1) (A) of the Code for such year, or the amount determined under subsection (a)(i) multiplied by 140%.

(ii) the term "defined contribution plan fraction" shall mean the aggregate annual additions to all of the Company's defined contribution plans (whether or not terminated) determined as of the close of the limitation year without regard to limitations on contributions over the sum of the lesser of the following amounts determined for such year and for each prior year of service with the Company: the dollar limitation

determined under Sections 415(b) and (d) of the Code in effect under Section 415 (c) (1) (A) of the Code for such year (determined without regard to Section 415 (c) (6) of the Code) multiplied by 125%, or 35% of the Participant's Compensation determined for such year.

(iii) for purposes of subsection (a) (ii), Compensation means a Participant's earned income, wages, salaries, and fees for professional services, and other amounts received (without regard to whether or not an amount is paid in cash) for personal services actually rendered in the course of employment with the Company to the extent such amounts are includable in gross income (including, but not limited to, commissions paid salespersons, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips and bonuses, fringe benefits, reimbursements and expense allowances), and excluding the following:

a. contributions of the Company to a plan of deferred compensation which are not included in the Participant's gross income for the taxable year in which contributed or Company contributions under a simplified employee pension plan to the extent such contributions are deductible by the Participant, or any distributions from a plan of deferred compensation;

b. amounts realized from the exercise of a nonqualified stock option, or when restricted stock (or property) held by the Participant either becomes freely transferable or is no longer subject to a substantial risk of forfeiture;

c. amounts realized from the sale, exchange or other disposition of stock acquired under a qualified stock option; and

d. other amounts which received special tax benefits, or contributions made by the Company (whether or not under a salary reduction agreement) towards the purchase of an annuity described in Section 403(b) of the Code (whether

or not the amounts are actually excludable from the gross income of the Participant.)

* * * *

ARTICLE V

ADMINISTRATIVE PROVISIONS

Section 5.1 - Administrative Duties and Powers of the Administrator

The Administrator shall conduct the general administration of the Plan in accordance with the Plan and shall have the discretionary power and authority to carry out that function including the following powers and authority:

(a) To determine questions of eligibility of Participants and the entitlement to Benefits of Participants, Former Participants, Beneficiaries, Contingent Annuitants and all other persons.

(b) As required by law, to engage and designate the Plan Enrolled Actuary, a qualified public accountant meeting the requirements of Section 103 (a) (3) (D) of ERISA, and other actuaries, accountants, attorneys, appraisers, brokers, consultants, administrators, physicians or other persons and (with the Companies and their officers, directors and employees) to rely upon the advice, opinions or valuations of any such persons and, except as required by law, be fully protected in acting or relying thereon in good faith.

(c) To interpret and construe the terms of the Plan.

(d) To conduct claims procedures as provided in Section 5.11.

(e) To delegate any power or duty to any other person or persons including a committee appointed pursuant to Section 5.3.

(f) To impose a reasonable charge to cover the cost of furnishing to Participants or Beneficiaries upon their written request documents as required under Section 104(b) (4) of ERISA (but not for furnishing information, statements or documents as required by Section 104(b) (1), (2) or (3) or Section 104 (c) or Section 105 (a) or (c) of ERISA).

(g) To exercise any powers delegated to the Administrator by the Trust Agreement.

Section 5.2 - Limitations Upon Powers of the Administrator

The Plan shall not be operated so as to discriminate in favor of Participants who are officers or shareholders or who are highly compensated. The Plan shall be uniformly and consistently interpreted and applied with regard to all Participants in similar circumstances. The Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purposes of the Plan.

Section 5.3 - Administrative Committee

Hughes may, but need not, appoint an Administrative Committee consisting of one or more members appointed by and holding office during Hughes's pleasure to function as the Administrator.

* * * *

Section 5.10 - Effect of Administrator Action

Except as provided in Section 5.11, all actions taken and all determinations made by the Administrator in good faith shall be final and binding upon all Participants, Former Participants, the Trustee, and any person interested in the Plan or the Trust Fund.

Section 5.11 - Claims Procedures

(a) A claim by a Participant, Former Participant, Beneficiary or any other person shall be presented to the Manager, Employee Benefits, Corporate Human Resources of

Hughes or such other claims official as may be appointed by Hughes in writing within the maximum time permitted by law or under the regulations promulgated by the Secretary of Labor or his delegate pertaining to claims procedures.

(b) The claims official shall, within a reasonable time, consider the claim and shall issue his or her determination thereon in writing.

(c) If the claim is granted, the appropriate distribution or payment shall be made from the Trust Fund or by the Companies.

(d) If the claim is wholly or partially denied, the claims official shall, within a reasonable time, provide the claimant with written notice of such denial, setting forth, in a manner calculated to be understood by the claimant,

(i) the specific reason or reasons for such denial,

(ii) specific references to pertinent Plan provisions on which the denial is based,

(iii) a description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary, and

(iv) an explanation of the Plan's claim review procedure.

(e) The Administrator shall provide each claimant with a reasonable opportunity to appeal the claims official's denial of a claim to it for a full and fair review. The claimant or his or her duly authorized representative

(i) may request a review upon written application filed with the Administrator,

(ii) may review pertinent documents, and

(iii) may submit issues and comments in writing.

(f) The Administrator may establish such time limits within which a claimant may request review of a denied claim as are reasonable in relation to the nature of the benefit which is the subject of the claim and to other attendant circumstances but which, in no event, shall be less than sixty (60) days after receipt by the claimant of written notice of denial of his or her claim.

(g) The decision by the Administrator upon review of a claim shall be made not later than sixty (60) days after its receipt of the request for review, unless special circumstances require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than one hundred twenty (120) days after receipt of such request for review.

(h) The decision on review shall be in writing and shall include specific reasons for the decision written in a manner calculated to be understood by the claimant with specific references to the pertinent Plan provisions on which the decision is based.

(i) To the extent permitted by law, the decision of the claims official (if no review is properly requested) or the decision of the Administrator on review, as the case may be, shall be final and binding on all parties, if warranted on the record and reasonably based on the law and the provisions of the Plan and Trust Agreement.

* * * *

ARTICLE VI

MISCELLANEOUS PROVISIONS

Section 6.1 - Termination of Plan

While the Plan is intended as a permanent program, a Company shall have the right at any time to declare the Plan terminated as to that Company or to discontinue its contributions to the Plan. In the event of such termination or

discontinuance, or in the event of partial termination or discontinuance to the extent applicable to the Participants affected thereby, the rights of all Participants in the employ of such Company to their Accrued Benefits, to the extent then funded, shall thereupon vest in full, subject to the order of priority set forth below. In the event of complete termination or discontinuance, the Administrator shall direct the Trustee to make a prompt determination of the fair market value of the Trust Fund and subject to the provisions of Section 6.7(c), the proportionate amount there of shall then be applied so as to provide (to the extent not already provided) Benefits in said order of priority, satisfying the requirements of each class in full before proceeding to the next class. Benefits for affected Participants shall be computed on the basis of Compensation received prior to the date of said termination or discontinuance and the funds then available, and proportionately reducing Benefits within the class as to which funds are adequate to provide Benefits in full, and such amounts when determined shall remain fixed regardless of any person's employment status thereafter. Subject to the provisions of Section 6.7 (c), such allocation shall be as follows:

(a) To provide a Normal Retirement Benefit, Early Retirement Benefit and Late Retirement Benefit to each Participant, Former Participant, Contingent Annuitant, or Beneficiary in an amount equal or Actuarially Equivalent to the Participant's unpaid Accrued Benefit Derived from Participant Contributions. For all purposes of this Section, cash payment may be made if so determined by the Administrator, without election by the Participant or limit on amount.

(b) To so provide all such Benefits payable as monthly payments in excess of amounts determined under subsection (a)

(i) Which were in pay status as of the beginning of the three-year period ending on the date of such termination or discontinuance as designated by the Administrator, in a manner not inconsistent with applicable law and regulations, based on

the provisions of the Plan (as in effect during the five-year period ending on such date) under which such Benefit would be the least, with the lowest Benefit in pay status during such three-year period considered the Benefit in pay status, and

(ii) Which would have been in pay status as of the beginning of such three-year period if the Participant had retired prior to the beginning of such three-year period and if his Benefit had commenced as a Normal Retirement Benefit as of the beginning of such period, to each such Benefit based on the provisions of the Plan (as in effect during the five-year period ending on such date) under which such Benefit would be the least.

(c) To so provide

(i) All other Benefits (if any) of individuals under the Plan guaranteed under Title IV of ERISA (determined without regard to Section 4022 (B) (a) thereof), and

(ii) The additional Benefits (if any) which would be determined under clause (i) if Section 4022(b) (5) of ERISA did not apply.

(d) To so provide all other Benefits under the Plan to the extent Vested without regard to this Section.

(e) To so provide all other Benefits under the Plan.

(f) To return surplus assets, if any, to Hughes or the Companies upon full satisfaction of the foregoing, upon full satisfaction of all liabilities described herein in accordance with Section 4044 (d) of ERISA, and in accordance with the Trust Agreement.

Section 6.2 - Suspension or Return of Contributions

(a) A Company shall have the right to suspend its contributions to the Plan at any time for a fixed period of time, and such period may be extended by subsequent actions of such Company. Such suspension shall automatically become a discontinuance of contributions as under Section 6.1 at any time at which in the opinion of the Plan Enrolled Actuary such

suspension affects the benefits to be paid or made available under the Plan. No such suspension shall be allowed to create an "accumulated funding deficiency" under Section 302 (a) (2) of ERISA, unless the Plan is then terminated under Section 6.1; provided that in the event of an unintentional creation of an accumulated funding deficiency, the Companies shall have ninety (90) days after such a deficiency is finally determined to correct it without such termination. In the event of such suspension, the Plan shall otherwise remain in full force and effect.

(b) Contributions to the Plan may not be returned to a Company, except as follows:

(i) If any contribution of a Company is not allowable or is disallowed as a federal tax deduction, such contribution must be returned to the Company;

(ii) If, in the event of Plan termination, the assets of the Plan are in excess of the amounts required to provide Plan Benefits, then the excess may be returned to the Company as provided in Section 6.1; or

(iii) If a contribution is made by a Company by a mistake of fact, the contribution may be returned to the Company within one year after the payment of the contribution.

Section 6.3 - Limitation on Rights of Participants

The Plan is strictly a voluntary undertaking on the part of the Companies and shall not constitute a contract between any Company and any Participant, or consideration for, or an inducement or condition of, the employment of a Participant. Nothing contained in the Plan shall give any Participant the right to be retained in the service of a Company or to interfere with or restrict the right of the Companies, which is hereby expressly reserved, to discharge or retire any Participant, except as provided by law, at any time with or without cause. Inclusion under the Plan will not give any Participant any right or claim to a retirement income or any other Benefit hereunder

except to the extent such right has specifically become fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee or he is entitled to benefit payments from the Pension Benefit Guaranty Corporation. The doctrine of substantial performance shall have no application to Participants. Each condition and provision, including numerical items, has been carefully considered and constitutes the minimum limit on performance which will give rise to the applicable right.

* * * *

Section 6.5 - Amendment of Plan

(a) As limited by the Trust Agreement, Sections 6.1 and 6.2 of the Plan and any applicable law, the Plan may be wholly or partially amended or otherwise modified retroactively or prospectively from time to time by Hughes and as approved by the Board. No amendment which changes the duties or powers of the Trustee shall be adopted without its approval.

(b) Subject to Section 6.1 and the Trust Agreement, no amendment shall be made at any time under which any part of the Trust Fund may be diverted to purposes other than for the exclusive benefit of Participants and their Beneficiaries or which shall decrease the percentage or amount of the interest of any Participant which shall theretofore have become Vested, or which shall decrease his Accrued Benefit.

(c) Notwithstanding anything herein to the contrary, this Plan may be amended prospectively or retroactively at any time by Hughes, upon reasonable notice to the Trustee, if deemed necessary to conform to the provisions and requirements of ERISA or the Code or regulations promulgated pursuant thereto in order to maintain the tax-exempt status of the Plan, or to conform to the provisions and requirements of any law, regulation, order or ruling affecting the character or purpose of the Plan.

* * * *

Section 6.7 - Consolidation or Merger

(a) In the event of the consolidation or merger of a Company with or into any other corporation, or the sale by a Company of its assets, the resulting successor may continue the Plan by adopting the same by resolution of its board of directors and by executing proper supplemental agreements with the Trustee. If within ninety (90) days from the effective date of such consolidation, merger or sale of assets, such new corporation does not adopt the Plan, the Plan shall be terminated as to that Company in accordance with Section 6.1.

(b) There shall be no merger or consolidation with, or transfer of assets or liabilities of the Plan to any other Plan unless each Participant in this Plan would (if the combined or successor plans were then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the Benefit he would have been entitled to receive under this Plan immediately before the merger, consolidation or transfer (if the Plan had then terminated).

(c) Any Company which adopts this Plan and which has maintained a predecessor plan or whose Employees participated in a predecessor plan shall adopt this Plan as a separate, and not a merged or combined Plan as to such Company for purposes of Sections 414(b) and 401(a) (12) of the Code, and Section 208 of ERISA, and the Trustee shall maintain in a separate subfund all assets acquired from such predecessor plan and all subsequent contributions by such Company under Section 3.1, as are actuarially determined to be required with respect to such predecessor plan, and shall pay all benefits attributable to such predecessor plan to Employees of such Company out of such separate subfund.

* * * *

Section 6.10 - Named Fiduciaries

(a) The Administrator and Hughes shall be named fiduciaries within the meaning of ERISA and, as permitted or

required by law, shall have exclusive authority and discretion to control and manage the operation and administration of the Plan within the limits set forth in the Trust Agreement, subject to proper delegation, and shall have the discretionary authority to determine eligibility for benefits and to construe the terms of the Plan.

(b) Such named fiduciaries, each investment manager within the meaning of Section 3(38) of ERISA and every person who exercises any discretionary authority or discretionary control respecting management of the Trust Fund or Plan, or exercises any authority or control respecting the management or disposition of the assets of the Trust Fund or Plan, or renders investment advice for compensation, direct or indirect, with respect to any moneys or other property of the Trust Fund or Plan or has authority or responsibility to do so, or has any discretionary authority or discretionary responsibility in the administration of the Plan, and any person designated by a named fiduciary to carry out fiduciary responsibilities under the Plan, shall be fiduciaries and, as such, shall be subject to provisions of the Plan, the Trust Agreement, ERISA and other applicable laws governing fiduciaries. Any person may act in more than one fiduciary capacity.

Section 6.11 - Allocation of Fiduciary Responsibilities

(a) Fiduciary responsibilities under the Plan are allocated as follows:

(i) the sole power and discretion to manage and control the Plan's assets including, but not limited to the power to acquire and dispose of Plan assets, is allocated to, the Trustee, except to the extent that another fiduciary is appointed with the power to control or manage (including the power to acquire and dispose of) assets of the Plan.

(ii) the sole duties, responsibilities and powers allocated to the Companies and to the boards of directors of the Companies shall be those expressed in the Plan or the Trust Agreement.

(iii) all fiduciary responsibilities not allocated to the Trustee, the board of directors of any Company, the Companies or any investment manager or other person or persons granted investment powers are hereby allocated to the Administrator, subject to delegation in accordance with Section 5.1(e).

(b) Fiduciary responsibilities under the Plan (other than the power to manage or control the Plan's assets) may be reallocated among fiduciaries by amending the Plan in the manner prescribed in Section 6.5, followed by such fiduciaries' acceptance of, or operation under, such amended Plan.

* * * *

Section 6.13 - Governing Law

The Plan and Trust Agreement shall be interpreted, administered and enforced in accordance with the Code and ERISA and the rights of Participants, Former Participants, Beneficiaries and all other persons shall be determined in accordance therewith; provided, however, that to the extent that state law is applicable, the laws of the State of California shall apply.

* * * *

Executed at Los Angeles, California, this 4th day of April, 1991.

HUGHES AIRCRAFT COMPANY

By Michael T. Smith /s/

Title Executive Vice President and Chief Financial Officer

By D. Kenneth Richardson /s/

Title President and Chief Operating Officer

APPROVED:

By John J. Higgins /s/

Title Senior Vice President and General Counsel

* * * *

EXHIBIT A

This Exhibit A contains additional terms of the Plan that apply to Participants in the contributory benefit structure, and are effective January 1, 1991, unless indicated otherwise.

ARTICLE I-A

DEFINITIONS

Section 1.1-A - Accrued Benefit

The "Accrued Benefit" of a Participant, as of his Separation from the Service, means the greatest of (a), (b), or (c):

(a) His Normal Retirement Benefit determined without regard to the Benefit Based on Final Average Monthly Compensation, but with reference to the greater of the Minimum Benefit or Career Average Benefit, calculated on the basis of his Benefit Accrual Service as of such Separation from the Service, or

(b) His Normal Retirement Benefit Based on Final Average Monthly Compensation

(i) calculated as if

a. there were added to his Total Benefit Accrual Service the period from the date of such Separation from the Service to his Normal Retirement Date, and

b. his Primary Insurance Amount were determined under Section 1.19-A, and

(ii) multiplied by a fraction, the numerator of which is his Total Benefit Accrual Service computed without the addition in subparagraph a and the denominator of which is his Total Benefit Accrual Service computed with such addition.

(c) The Actuarial Equivalent of his total Participant Contributions without interest, exclusive of Participant Contributions made prior to a break in Continuous Service commencing before 1976.

(d) For purposes of providing a transition for the implementation of the limitation on Compensation in excess of $200,000 (as adjusted) as provided in Section 1.7-A (b) (hereinafter "Compensation Limitation"), the Participant's Accrued Benefit shall be the greater of (i) or (ii), but in no event greater than (iii), as follows:

(i) the Participant's Accrued Benefit as of November 30, 1989, determined without regard to the Compensation Limitation, plus the Participant's Accrued Benefit accrued from December 1, 1989, with regard to the Compensation Limitation,

(ii) the Participant's Accrued Benefit determined on the basis of Total Benefit Accrual Service and by applying the Compensation Limitation to all such Benefit Accrual Service,

(iii) the Participant's Accrued Benefit determined on the basis of Total Benefit Accrual Service without regard to the Compensation Limitation.

<u>Section 1.2-A</u> - <u>Accrued Benefit Derived from Company Contributions</u>

The "Accrued Benefit Derived from Company Contributions" of a Participant as of his Separation from the Service means that Benefit equal to the excess (if any) of the Participant's Accrued Benefit minus his Accrued Benefit Derived from Participant Contributions.

<u>Section 1.3-A</u> - <u>Accrued Benefit Derived from Participant Contributions</u>

The "Accrued Benefit Derived from Participant Contributions" of a Participant as of his Separation from the Service means the greater of:

(a) His Accrued Benefit, or

(b) His annual benefit in the form of a single life annuity (without ancillary benefits) commencing at Normal Retirement Date, determined by converting his Participant Contributions Account by using an interest rate which would be used as of

the first day of the month coincident with or next following his Separation from the Service under the Plan under Section 417 (e) (3) (B) of the Code.

<u>Section 1.4-A</u> - <u>Benefit Accrual Service</u>

"Benefit Accrual Service" of a Participant means the total, expressed in years and fractional years, of:

(a) Those Accounting Months (treating each Accounting Month as one-twelfth (1/12th) year and excluding Accounting Months commencing before a break in his Continuous Service commencing before 1976) for any part or all of which he made contributions to the Plan as a Participant or as a participant in the Income Insurance Plan; and, as applicable, either

(b) For a person employed by a Company on January 1, 1980, benefit accrual service credited to such Employee under the Hughes Retirement Plan prior to January 1, 1980, provided such Employee was not an Employee in a Bargaining Unit on such January 1st, or

(c) For a former Employee not employed by a Company on January 1, 1980, benefit accrual service credited to such former Employee under the Hughes Retirement Plan prior to January 1, 1980, provided such former Employee's last job classification was not treated as an Employee in a Bargaining Unit.

<u>Section 1.5-A</u> - <u>Benefit Based on Final Average Monthly Compensation</u>

The "Benefit Based on Final Average Monthly Compensation" means the Benefit determined under Section 4.3-A.

<u>Section 1.6-A</u> - <u>Career Average Benefit</u>

The "Career Average Benefit" means the Benefit determined under Section 4.5-A.

Section 1.7-A - Compensation

(a) "Compensation" of a Participant for any Plan Year commencing on and after December 1, 1989:

(i) means (except as provided in subsection (b)) his base pay, shift differential pay, Company sick leave pay, payments of state unemployment compensation for disability while receiving Company sick leave pay, payments of workers' compensation for disability while receiving Company sick leave pay, payment for overtime hours, vacation actually taken, holiday, bereavement, personal leave, jury duty or military training pay, sea duty premium, hazard area premium, domestic field allowances, flight pay, compensable travel pay, capture and detention pay, foreign service premiums, working leader bonuses, sales commissions or bonuses, cost of living allowances, amounts paid under the Hughes Salary Adjustment Plan, Hughes Supplemental Compensation Plan, the Hughes Management Incentive Plan and the Hughes Investment Management Company Incentive Plan, amounts deferred by the Participant and contributed as a Company contribution to the Hughes Salaried Employees' Thrift and Savings Plan and amounts deferred by a Participant to the flexible spending account in a Company cafeteria plan under Section 125 of the Code, but

(ii) shall exclude Compensation of any Participant in excess of $209,200, as adjusted by the Secretary of the Treasury at the same time and in the same manner as under Section 415 (d) of the Code, except that the dollar increase in effect on January 1st of any calendar year commencing on or after January 1, 1991, is effective for the Plan Year that next commences, shall exclude any compensation paid or not paid by a Company (unless specifically included in paragraph (i), foreign service allowances for post, quarters, education, dual housing, home leave and tax differential, profit-sharing payments, public or private retirement payments, contributions (except Employee contributions) or benefits, retainers, insurance benefits or Company-paid premiums, payments for

vacation not taken, and any other special payments not specifically included in paragraph (i).

(b) For a Participant who elects to participate under the non-contributory benefit structure under Exhibit B, commencing January 1, 1991, Compensation will have the meaning as provided in Section 1.3-B.

Section 1.8-A - Cost of Living Adjustment

The "Cost of Living Adjustment" means the adjustment determined under Section 4.13-A.

Section 1.9-A - Death Benefit

"Death Benefit" means the Benefit provided following the death of a Participant determined under Section 4.11-A.

Section 1.10-A - Early Retirement Benefit

"Early Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.7-A.

Section 1.11-A - Joint and Survivor Annuity

"Joint and Survivor Annuity" of a Participant or Former Participant means the form of Benefit payable to or with respect to him under Section 4.15-A.

Section 1.12-A - Late Retirement

"Late Retirement" of a Participant or Former Participant means his retirement upon his Late Retirement Date.

Section 1.13-A - Late Retirement Benefit

"Late Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.9-A.

Section 1.14-A - Minimum Benefit

The "Minimum Benefit" means the Benefit determined under Section 4.4-A.

Section 1.15-A - Normal Retirement Benefit

"Normal Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.2-A.

Section 1.16-A - Optional Retirement Benefit

"Optional Retirement Benefit" of a Participant or Former Participant means the optional form of Benefit payable to or with respect to him under Section 4.14-A.

Section 1.17-A - Participant Contributions

"Participant Contributions" of a Participant means his contributions to the Plan under Section 3.1-A or its predecessor.

Section 1.18-A - Participant Contributions Account

"Participant Contributions Account" of a Participant means his individual account established in accordance with Section 3.4-A.

Section 1.19-A - Primary Insurance Amount

The "Primary Insurance Amount" of a Participant means the monthly primary insurance amount of his old age insurance benefit determined as of his Normal Retirement Date under the federal Social Security Act as in effect on the date of his Separation from the Service, whether more or less than the amount which would be payable if such Act remained unamended until that Date and whether or not the Participant actually applies for and receives such amount for any month, by assuming that he will receive Compensation at rates applicable on the date of such Separation from the Service, over a further period of employment extending to his Normal Retirement Date. The Primary Insurance Amount of a Participant who again becomes a Participant following his Separation from the Service shall in no event exceed the amount which would produce that Normal Retirement Benefit to which such Participant would have been entitled had he not again become an Employee following such Separation from the

Service. For any Participant for whom the Primary Insurance Amount cannot be ascertained as herein provided, said amount shall be that amount which the Administrator shall reasonably estimate. The Primary Insurance Amount determined herein for any Participant will be adjusted to reflect the actual salary history for years previously estimated before his Separation from the Service if the Participant supplies documentation of that history. Such documentation must be provided no later than a reasonable period of time following the later of the date of his Separation from the Service and the time the Participant is notified of the Benefit to which he or she is entitled. No Benefit hereunder shall be decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act or any increase in the wage base under such Title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the date of first receipt of such Benefits or the date of Separation from the Service of the Participant to whom or with respect to whom such Benefits are paid, as the case may be.

Section 1.20-A - Vested Retirement Benefit

"Vested Retirement Benefit" of a Participant or Former Participant means the benefit which is nonforfeitable in accordance with Section 4.12-A.

ARTICLE II-A

ELIGIBILITY

Section 2.1-A - Requirements for Participation

(a) Effective January 1, 1991,

(i) any hourly Employee who was a Participant in the Plan on December 31, 1990, and who is not an Employee in a Bargaining Unit, and

(ii) any salaried Employee who was a Participant in the Plan on December 31, 1990, who is not an Employee in a Bargaining Unit, and who as a salaried Employee does not

elect in writing by December 21, 1990, to participate in the non-contributory benefit structure set forth in Exhibit B,

shall remain a Participant until Section 2.2 applies to him.

(b) Any other salaried Employee who:

(i) is an Employee of the Company on August 1, 1990, and

(ii) completes either:

a. a twelve-month period commencing with

1. his first Hour of Service since the date he was hired as an Employee of a Company (whether or not then a Company), or

2. his Anniversary Date

in which period he had completed one thousand (1,000) or more Hours of Service, or

b. twelve (12) months of Company Service, and

(iii) is not an Employee in a Bargaining Unit, and

(iv) is on the United States payroll of a Company (as maintained by such Company in accordance with its established practice), and

(v) elects in writing by December 21, 1990, to be a Participant,

shall become a Participant on the entry date determined as the first Monday of the calendar month coincident with or next following his satisfaction of such requirements.

(c) Any Participant whose participation is terminated by a Separation from the Service after August 1, 1990, shall not be eligible to again become a Participant upon again becoming an Employee.

(d) Any Former Participant who was a salaried Employee and who has a Separation from the Service prior to December 21, 1990, because of a layoff shall be eligible to again become

a Participant upon being recalled from layoff, by again becoming a salaried Employee, and by electing to be a Participant within such time as may be determined by the Administrator.

<u>Section 2.2-A</u> - <u>Suspension During Continuous Service</u>

A Participant may suspend his participation in the Plan during his Continuous Service at any time by giving such advance written notice to the Administrator as is required under the Rules of the Plan that he declines to make contributions under Section 3.1-A, which notice shall be effective and irrevocable for a period of twelve (12) calendar months in accordance with its terms upon receipt by the Administrator.

<u>Section 2.3-A</u> - <u>Forfeitures</u>

If a Participant has a Separation from the Service for any reason prior to obtaining a fully Vested Retirement Benefit, the invested portion of his Accrued Benefit Derived from Company Contributions shall be forfeited at the earlier of:

(a) That date when the number of his consecutive Break in Service Years equals five (5), or

(b) His withdrawal of Participant Contributions under Section 3.5-A (a) provided that any such invested portion shall be restored subject to subsequent forfeiture under this Section, if, before subsection (a) applies, he restores such withdrawn Contributions with interest under Section 3.5-A (b).

ARTICLE III-A
FUNDING BENEFIT

Section 3.1-A - Participant Contributions

As a condition of his admission to and continued active participation in the Plan, each Participant, except a Participant on inactive status under Section 2.4, shall contribute to his Participant Contributions Account for each payroll period during his participation in the Plan prior to his Early, Normal or Late Retirement Date (and for Plan Years ending prior to December 1, 1988, limited to his participation in the Plan prior to his Early or Normal Retirement Date), as provided under Rules of the Plan, on and after January 1, 1986, 3% of his Compensation earned in the Plan Year (and prior to January 1, 1986, 2% of the first $3,600 of his Compensation earned in a Plan Year and 4% of such Compensation, if any, in excess of $3,600). A Participant, who is an Employee, except a Participant on inactive status under Section 2.4, receiving Benefits under the Income Insurance Plan shall contribute on and after January 1, 1986, 3% (and prior to January 1, 1986, 4%) of his regular pay, including any shift differential and then current cost-of-living allowances for his job classification and regularly-scheduled work-week at the rate in effect on his last day on the job.

Section 3.2 -A - Withholding of Contributions

A Participant's Contributions to his Participant Contributions Account shall be withheld by the Company for each payroll period from his pay, or shall be paid in cash to the extent of any excess of such contributions over the amount available for withholding, or by the insurer from his benefits under the Income Insurance Plan.

Section 3.3-A - Deposit of Participant Contributions

A Participant's Contributions shall be transmitted to the Trustee not later than the end of the calendar month following the calendar month in which such contributions are made.

Section 3.4-A - Participant Contributions Accounts

The Administrator shall maintain a Participant Contributions Account for each Participant who has made Participant Contributions to the Plan, to which Account shall be credited the balance, if any, in such Account as of December 31, 1975, exclusive of amounts related to Participant Contributions made before a break in Continuous Service commencing before 1976, together with contributions or repayments, if any, under Section 3.1-A or 3.5-A(b), and less withdrawals under Section 3.5-A(a) and, on the aggregate net amount so credited, interest compounded annually from the end of the Plan Year in which they were credited to his Participant Contributions Account at the rate of 5% per year commencing January 1, 1976, through November 30, 1988, for Plan Years beginning after November 30, 1988, and ending with the date of his Separation from Service on which the determination is being made, interest compounded annually at 120% of the federal mid-term rate as in effect under Section 1274 of the Code on December 1st of each Plan Year. From the date of his Separation from the Service and ending on the date of withdrawal of Participant Contributions under Section 3.5-A(a), the Participant shall be entitled to the present value of his Accrued Benefit Derived from Participant Contributions calculated using the Accrued Benefit Derived from Participant Contributions determined on his Separation from the Service and using an interest rate which would be used as of the date of withdrawal under the Plan under Section 417(e) (3) (B) of the Code.

Section 3.5-A - Withdrawals and Repayments

(a) Subject to the vesting provisions of Section 4.12-A, a Participant who has a Separation from the Service may withdraw in cash the amount referred to in Section 4.2-A(a) (ii) a of the Normal Retirement Benefit upon written notice to the Administrator at any time during a Separation from the Service provided that such written notice is given prior to the Participant's Annuity Starting Date. If the withdrawal occurs in connection with the retirement of the Participant, the determination of the amount of the withdrawal will be calculated to the Participant's Annuity Starting Date. For all other withdrawals hereunder, interest shall be calculated on the amount of the withdrawal as of the first day of the month following the receipt of written notice.

(b) A Participant, but not a Former Participant, may within sixty (60) months following his first rehire or recall and prior to his Annuity Starting Date while employed by the Company, repay to the Trust in full (but not partially) the amount he withdrew under subsection (a) after 1975 (but not earlier), together with interest compounded annually on such amount at the rate referred to in Section 3.4-A, and shall thereby be restored to the same Accrued Benefit he would have had if no withdrawal had been made after 1975.

(c) Withdrawals from the Plan other than as permitted in subsection (a) are prohibited.

ARTICLE IV-A

RETIREMENT, TERMINATION, OR DEATH

Section 4.1-A - Normal Retirement

A Participant shall be entitled to his Normal Retirement Benefit hereunder on his Normal Retirement Date, unless the Participant elects his Early Retirement Benefit or Late Retirement Benefit.

Section 4.2-A - Normal Retirement Benefit

(a) A Participant who retires on his Normal Retirement Date shall receive a Normal Retirement Benefit, which, subject to the provisions of the Optional Retirement Benefit and the Joint and Survivor Annuity, shall consist of:

(i) a monthly payment on the first day of each calendar month commencing with his Normal Retirement Date and ending with the last such payment before his death, and

(ii) a payment within five (5) years after his death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of

a. the sum, net of any unrepaid withdrawals after 1975 under Section 3.5-A, of

1. the balance, if any in his Participant Contributions Account on December 31, 1975,

2. his Participant Contributions after 1975, and

3. interest compounded annually to the date of his first monthly payment, with proper allowance for any earlier unrepaid withdrawal under Section 3.5-A, at the rate of interest specified in Section 3.4-A, and on such post-1975 Participant Contributions from the end of the Plan Year in which they were credited to his Participant Contributions Account, minus

b. the aggregate of all payments made to him under paragraph (i).

(b) The monthly Benefit payment described in subsection (a) (i) shall be the greatest of alternative Benefits determined under the Benefit Based on Final Average Monthly Compensation, the Minimum Benefit and the Career Average Benefit, reduced to eliminate the Actuarial Equivalent of any prior forfeitures under Section 2.3-A and any prior withdrawals under Section 3.5-A (a) not repaid under Section 3.5-A (b), and then adjusted pursuant to the Cost of Living Adjustment.

Section 4.3-A - Alternative Formula: Benefit Based on Final Average Monthly Compensation

A Participant's alternative Benefit determined under this Section shall be an amount determined by calculating:

(a) The product of:

(i) the factor of .0175 (but in the case of Benefits payable to a Participant whose last Separation from the Service was after June 30, 1978, and before December 7, 1980, the factor of .01625, or whose last Separation from the Service is before July 1, 1978, the factor of .015),

(ii) his Benefit Accrual Service, and

(iii) his Final Average Monthly Compensation, minus

(b) The product of:

(i) the factor of .015,

(ii) his Total Benefit Accrual Service (not in excess of 33-1/3 years),

(iii) the factor determined by dividing

a. his Benefit Accrual Service by

b. his Total Benefit Accrual Service, and

(iv) his Primary Insurance Amount.

Section 4.4-A - Alternative Formula: Minimum Benefit

A Participant's alternative Benefit determined under this Section shall be the product of:

(a) His Benefit Accrual Service, and

(b) The sum of:

(i) $13.00 (but in the case of Benefits payable to a Participant whose last Separation from the Service was on or after December 5, 1982, and before January 1, 1986, the amount of $11.00; but in the case of Benefits payable to a Participant whose last Separation from the Service was on or

after December 3, 1979, and before December 5, 1982, the amount of $9.50; and in the case of Benefits payable to a Participant whose last Separation from the Service was after December 31, 1975, and before December 3, 1979, the amount of $7.00, and

(ii) the product of:

a. the factor of .005 and

b. his Final Average Monthly Compensation.

Section 4.5-A - Alternative Formula: Career Average Benefit

A Participant's alternative Benefit determined under this Section shall be the sum of:

(a) The product of:

(i) the fraction one twenty-fourth (1/24th) and

(ii) the aggregate principal amount of his Participant Contributions, net of any unrepaid withdrawals under Section 3.5-A, and

(b) The amount by which

(i) his Accrued Benefit as of December 31, 1975, (as shown on the Administrator's records) exceeds

(ii) one twenty-fourth (1/24th) of the aggregate principal amount of his Participant Contributions determined as such date, and

(c) On or after January 1, 1986, one-twelfth (1/12th) of the sum of 1% of the first $3,600 of his Compensation earned in a Plan Year and 2% of such Compensation in excess of $3,600.

Section 4.6-A - Early Retirement

A Participant shall be entitled to his Early Retirement Benefit hereunder on his Early Retirement Date.

Section 4.7-A - Early Retirement Benefit

(a) Participant who retires on his Early Retirement Date shall receive an Early Retirement Benefit which, subject to the provisions of the Cost of Living Adjustment, the Optional Retirement Benefit and the Joint and Survivor Annuity, and the vesting provisions under Section 4.12-A, shall consist of:

(i) a monthly payment on the first day of each calendar month commencing with his Early Retirement Date and ending with the last such payment before his death, and

(ii) a payment within five (5) years after his death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of

a. the amount remaining in the Participant Contributions Account described in Section 4.2-A(a) (ii)a of the Normal Retirement Benefit, minus

b. the aggregate of all payments made to him under paragraph (i).

(b) The amount of each such monthly payment, except as provided in subsection (c) and the Cost of Living Adjustment, shall be equal to the excess, expressed in terms of a monthly payment, of the Actuarial Equivalent of his Vested Accrued Benefit computed without regard to the Cost of Living Adjustment minus the Actuarial Equivalent of his Benefit under subsection (a) (ii).

(c) In the case of a Participant on the United States payroll not on inactive status under Section 2.4, the sum of whose full years of Continuous Service on his Early Retirement Date and age in years as of his last birthday coinciding with or preceding such Date equals or exceeds seventy-five (75) ("rule of 75"), the amount of each such monthly payment shall be equal to the monthly payment (including adjustments under the Cost of Living Adjustment) included in his Accrued Benefit.

Section 4.8-A - Late Retirement

A Participant shall be entitled to his Late Retirement Benefit hereunder on his Late Retirement Date, or on his Annuity Starting Date if occurring later than his Normal Retirement Date.

Section 4.9-A - Late Retirement Benefit

(a) A Participant who retires on his Late Retirement Date, or who elects an Annuity Starting Date occurring later than his Normal Retirement Date, shall receive a Late Retirement Benefit which, subject to the provisions of the Cost of Living Adjustment, the Optional Retirement Benefit and Joint and Survivor Annuity, shall consist of:

(i) a monthly payment on the first day of each calendar month commencing with his Annuity Starting Date, which would be his Late Retirement Date if no election to defer the Annuity Starting Date is made, and ending with the last such payment before his death, and

(ii) a payment within five (5) years after his death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of:

a. the amount remaining in the Participant Contributions Account described in Section 4.2-A (a) (ii) a of the Normal Retirement Benefit, minus

b. the aggregate of all payments made to him under paragraph (i).

(b) For eligible Participants determined for Plan Years ending on or before November 30, 1988, to the amount of each monthly payment determined in Section 4.2-A (a) (i) of the Normal Retirement Benefit, shall be added the excess, expressed in terms of a monthly payment, of the Actuarial Equivalent of the Normal Retirement Benefit he would have received under Section 4.2-A (a) (i) of the Normal Retirement Benefit (after application of the Cost of Living Adjustment and an interest rate equal to 9% per annum (or at such time as the

interest rate determined under Section 1.4(a) is equal to or greater than 9%, then such interest rate determined under Section 1.4(a)), had he retired upon his Normal Retirement Date. For eligible Participants determined for Plan Years beginning on or after December 1, 1988, to the amount of each monthly payment determined in Section 4.2-A(a) (i) of the Normal Retirement Benefit shall be added the excess of the Accrued Benefit Derived from Participant Contributions as of his Late Retirement Date, minus the sum of the Accrued Benefit Derived from Participant Contributions attributable to contributions made in each Plan Year after Normal Retirement Date. Amounts determined in the prior sentence shall be on the basis of the interest rate which would be used as of the Late Retirement Date under the Plan under Section 417(e) (3) (b) of the Code.

Section 4.10-A - Actuarial Equivalence

The Participant's Optional Retirement Benefit or the Joint and Survivor Annuity shall, except for the vesting provisions under Section 4.12-A, be the Actuarial Equivalent of his Early, Normal, or Late Retirement Benefit such Equivalent being computed as of his Annuity Starting Date.

Section 4.11-A - Death Benefit

(a) If a Participant or Former Participant dies prior to the due date of the first monthly Benefit payment payable to him under the Plan, and if the other subsections of this Section are not applicable, there shall be paid in cash in a lump sum to his properly designated Beneficiary or Beneficiaries an amount equal to the balance of his Participant Contributions Account and all his other Benefits (if any) shall be forfeited.

(b) If a Participant's age is fifty-five (55) or older, has a Separation from the Service due to his death, or has a Separation from the Service because of retirement but dies prior to the first day of the month coinciding with or next following retirement within which the initial payment of any benefit is or would be payable to him, and leaves a surviving

spouse, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall in accordance with Rules of the Plan elect to receive either the Benefit described in subsection (c) or the Benefit described in subsection (d). In the event benefits are paid under this subsection, then no Beneficiary (other than the spouse) shall be entitled to receive benefits under the Plan, except as provided in subsection (c)(ii).

(c) The Benefit described in this subsection shall consist of:

(i) a monthly payment to such spouse on the first day of each calendar month commencing with the month following the month of such Participant's death, and continuing through the month of such spouse's death, in an amount equal to the monthly Benefit which such spouse would have received under Section 4.14-A(b) (i)a of the Optional Retirement Benefit had the Participant retired immediately prior to his death and elected under Section 4.14-A(b) (i)a of the Optional Retirement Benefit to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be, subject to adjustment in the manner provided in the Cost of Living Adjustment, naming such spouse as Contingent Annuitant and providing that such monthly payments to the surviving Contingent Annuitant after the Participant's death should be equal to 100% of the payments to the Participant during his life, subject to adjustment in the manner provided in the Cost of Living Adjustment, and

(ii) upon the death of such spouse, payment in cash in a lump sum to such Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of:

a. The amount remaining in the Participant Contributions Account described in Section 4.2-A(a) (ii)a of the Normal Retirement Benefit, minus

b. The aggregate of all payments made under paragraph (i).

(d) The Benefit described in this subsection shall consist of:

(i) a lump sum payment payable not later than the end of the Plan Year following the Plan Year of the death of such Participant to the surviving spouse in an amount equal to the sum referred to in Section 4.2-A(a) (ii)a of the Normal Retirement Benefit, and

(ii) a monthly payment, adjusted in the manner provided in the Cost of Living Adjustment, on the first day of each calendar month commencing with the month following the month of such Participant's death, and ending with the month of such spouse's death, in an amount Actuarially Equivalent as so adjusted to the sum of:

a. the Participant's Accrued Benefit Derived from Company Contributions, and

b. an amount Actuarially Equivalent to the excess, if any of his Accrued Benefit Derived from Participant Contributions minus the Benefit provided for under this subsection (d) as computed without regard to this subparagraph b.

(e) Unless the provisions of Section 4.11-A(b) of the Death Benefit apply, if a Participant dies with a Vested Retirement Benefit or if a Former Participant dies with a Vested Retirement Benefit after a Separation from the Service, and such death is prior to the due date of the first monthly Benefit payable to him under the Plan and if he is survived by the spouse to whom he was married throughout the three hundred and sixty-five (365) day period immediately preceding his death, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall receive a survivor annuity consisting of:

(i) if the Former Participant dies after his earliest retirement age, such spouse shall, in accordance with the Rules of the Plan, elect to receive either the benefit described in subsection a or the benefit described in subsection b.

a. The Benefit described in this subsection shall consist of:

i. a monthly payment to such spouse on the first day of each calendar month commencing with the month following the month of such Former Participant's death, and continuing through the month of such spouse's death, in an amount equal to the monthly Benefit which such spouse would have received under Section 4,14-A (b) (i) a of the Optional Retirement Benefit had the Former Participant retired immediately prior to his death and elected under Section 4.14-A (b) (i) a of the Optional Retirement Benefit to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be, in the form of a fixed annuity contract naming such spouse as Contingent Annuitant and providing that such monthly payments to the surviving Contingent Annuitant after the Former Participant's death should be equal to 100% of the payments to the Former Participant during his life, and

ii. upon the death of such spouse, payment in cash in a lump sum to such Former Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of the sum described in Section 4.2-A (a) (ii) a of the Normal Retirement Benefit, minus the aggregate of all payments made under item i.

b. The Benefit described in this subsection shall consist of:

i. a lump sum payment payable not later than the end of the Plan Year following the Plan Year of the death of such Former Participant to the surviving spouse in an amount equal to the sum referred to in Section 4.2-A (a) (ii) a of the Normal Retirement Benefit, and

ii. a monthly payment, on the first day of each calendar month commencing with the month following the month of such Former Participant's death, and ending with the month of such spouse's death, in an amount Actuarially Equivalent to the sum of the Participant's Accrued Benefit Derived from Company Contributions, and an amount Actuarially Equivalent to the excess, if any of his Accrued Benefit Derived from Participant Contributions minus the Benefit provided for under this subparagraph b as computed without regard to this item ii.

(ii) If the Participant or Former Participant dies prior to his earliest retirement age, a monthly payment commencing on the first day of the calendar month following the month in which the Participant or Former Participant would have attained his earliest retirement age and ending with the calendar month in which the spouse dies, equal to 50% of the monthly amount the Participant or Former Participant would have received if he retired electing a Joint and Survivor Annuity, and if such Participant had:

a. a Separation from the Service on the date of death,

b. survived to the earliest retirement age,

c. retirement with an immediate qualified Joint and Survivor Annuity at the earliest retirement age,

d. died on the day after the day on which such Participant would have attained the earliest retirement age, and

e. in the case of an individual who has a Separation from the Service before the date of such individual's death, subparagraph a shall not apply; plus

(iii) upon the death of such spouse, payment shall be made in cash in a lump sum to such Participant or Former Participant's duly designated Beneficiary or Beneficiaries of an amount equal to the excess, if any, of:

a. the amount remaining in the Participant Contributions Account described in Section 4.2-A(a) (ii) a of the Normal Retirement Benefit, minus

b. the aggregate of all payments made under subsection (e).

(f) Subsection (e) shall apply only if:

(i) a Participant has at least one Hour of Service with the Company on or after August 23, 1984; or

(ii) a Participant has at least one Hour of Service on or after January 1, 1976, and when such Participant incurred a Separation from the Service he had ten (10) or more Years of Vesting Schedule Service; or

(iii) a Participant who has one Hour of Service on or after September 2, 1974, was employed by the Company after the earliest date on which such Participant was eligible for early retirement benefits under the Plan; and

(iv) such Participant dies after August 23, 1984, prior to reaching his Annuity Starting Date.

Section 4.12-A - Vested Retirement Benefit

Each Participant shall be entitled to a Vested Retirement Benefit in the amount provided in this Section. In the event of his Separation from the Service prior to his Normal Retirement Date, except for the Joint and Survivor Annuity and the Death Benefit, such Participant shall upon his Normal Retirement Date become entitled to a Normal or Optional Retirement Benefit, or upon his Early Retirement Date may receive an Early or Optional Retirement Benefit, as he shall elect, or in the absence of such election, as determined under the provisions of the Normal Retirement Benefit, the Cost of Living Adjustment, the Optional Retirement Benefit, and the Joint and Survivor Annuity, but, in each case, if his Separation from the Service preceded his fifty-fifth (55th) birthday, without regard to the Cost of Living Adjustment and "the rule of 75" under Section 4.7-A(c), all in an amount Actuarially Equivalent to the sum of:

(a) his Accrued Benefit Derived from Participant Contributions, and

(b) effective for Plan Years commencing December 1, 1989, that percentage of his Accrued Benefit Derived from Company Contributions determined on the basis of his Years of Vesting Service as follows:

Years of Vesting Service	Vested Percentage
Less than 5	0%
5 or more	100%

A Participant's Vested Retirement Benefit shall in no event be diminished because of any subsequent reductions in his Vesting Service. A Participant's Accrued Benefit to the extent not forfeited under Section 2.3 or paid as a Death Benefit shall become 100% Vested if he is then employed by a member of the Controlled Group on his sixty-fifth (65th) birthday.

Section 4.13-A - Cost of Living Adjustment

(a) The monthly Benefit payable under Section 4.2-A (a) (i) of the Normal Retirement Benefit, 4.7-A (a) (i) of the Early Retirement Benefit or 4.9-A (a) (i) of the Late Retirement Benefit or in respect of a Participant during any Plan Year (he "subject Plan Year") after the first Plan Year in which monthly Benefits were so payable shall be adjusted by multiplying the monthly Benefit so payable during the Plan Year immediately preceding the subject Plan Year (after applying the Cost of Living Adjustment to such preceding Plan Year) by a factor (not over 1.040 and not under 0.960) computed to at least three decimal places, determined by dividing:

(i) the United States Bureau of Labor Statistics Consumer Price Index (All Urban Consumers, all items, United States city average, 1967 = 100) as revised, for the September next before the subject Plan Year

by

(ii) such Index for the September of the second year before the subject Plan Year.

(b) Notwithstanding the provisions of subsection (a), the adjustment provided in such subsection shall not result in a monthly Benefit less than the monthly Benefit initially payable to or in respect of the Participant.

(c) If the Plan is terminated under Section 6.1, no further adjustments shall be made under this Section, except as to Former Participants who had retired under a Normal Retirement Benefit, Early Retirement on or after his fifty-fifth (55th) birthday or Late Retirement Benefit (but not if his Separation from the Service was prior to being Vested) on or prior to the date of such termination.

(d) No adjustment shall be made under this Section to a Benefit payment payable in a lump sum on the death of a Participant as described in Section 4.2-A (a) (ii) of the Normal Retirement Benefit.

Section 4.14-A - Optional Retirement Benefit

A Participant entitled to receive a Normal, Early, or Late Retirement Benefit shall receive the 50% Joint and Survivor Annuity (if applicable) unless he elects not to receive such annuity, elects instead to receive a distribution in accordance with subsection (a), (b) or (c) and his spouse consents in writing to such election in accordance with Section 4.15-A (h). A Participant to whom a Joint and Survivor Annuity does not apply and who makes no election under this Section shall receive a Benefit in accordance with subsection (a). A Participant may not make or change an election hereunder after his Annuity Starting Date. A Participant may elect, in accordance with Rules of the Plan, to receive his Benefit in any one of the following manners:

(a) A Normal, Early or Late Retirement Benefit, as the case may be,

(b) A Benefit consisting of:

(i) monthly payments commencing on his Annuity Starting Date:

a. in the form of a joint and survivor annuity option payable to the Participant for his life, and monthly payments to his Beneficiaries or his Contingent Annuitants for life (in amounts as selected by the Participant equal to a survivor annuity of 50%, 66-2/3%, 75% or 100% of the monthly amount paid to such Participant),

b. in the form of a period certain and continuous option payable to the Participant and his Beneficiaries over the later of a period certain for a guaranteed number of payments (for a period as selected by the Participant of five (5), ten (10), or fifteen (15) years) or the life of Participant, or

c. in the form of a period certain option payable to the Participant and his Beneficiaries for a period certain for a guaranteed number of payments (for a period as selected by the Participant of five (5), ten (10), fifteen (15) years), or

d. in the form of a temporary modified cash refund option payable to the Participant and his Beneficiaries over the earlier of a period certain (for a period as selected by the Participant of five (5), ten (10), fifteen (15) years), or the life of the Participant,

and adjusted in the manner in the Cost of Living Adjustment, all as determined under Rules of the Plan, and

(ii) upon the death of the Participant, and his Contingent Annuitant (if any) or primary Beneficiaries (if any), payment to the Participant's duly designated secondary Beneficiary or Beneficiaries in cash in a lump sum an amount equal to the excess, if any, of:

a. the amount remaining in the Participant Contributions Account described in Section 4.2-A (a) (ii) a of the Normal Retirement Benefit, minus

b. the aggregate of all payments made under paragraph (i), or

(c) A Benefit which is the Actuarial Equivalent of his Benefit in subsection (a) consisting of:

(i) a monthly payment commencing on his Annuity Starting Date payable through the earlier of the month in which he dies or the month before his sixty-second (62nd) or sixty-fifth (65th) birthday, as he shall elect, and thereafter through the month in which he dies reduced by an amount estimated to equal his monthly Social Security old age benefits payable at such birthday as projected under Rules of the Plan, and all adjusted in the manner provided in the Cost of Living Adjustment, and

(ii) a payment within five (5) years after this death in a lump sum to his properly designated Beneficiary or Beneficiaries in an amount equal to the excess, if any, of:

a. the amount remaining in the Participant Contributions Account described in Section 4.2-A (a) (ii) a of the Normal Retirement Benefit, minus

b. the aggregate of all payments made under paragraph (i).

(d) The option provided in subsection (c) may be elected with the Normal, Early or Late Retirement Benefit under subsection (a), the Joint and Survivor Annuity payable under Section 4.15-A, or a joint and survivor annuity option under subsection (b) (i) (a), but may not be coupled with any other option provided in subsection (b).

(e) No Optional Retirement Benefit may be selected where the Beneficiary or Contingent Annuitant is other than the spouse, unless such option will assure that at least 50% of the present value of the Benefit available for distribution is payable within the life expectancy of the Participant.

(f) If a Participant dies after his Annuity Starting Date, the remaining portion of his Benefit, if any, may continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death to the Contingent Annuitant, if living, or otherwise to the Participant's designated primary Beneficiary; provided, however, if the primary Beneficiary is the estate of the Participant, or if the primary Beneficiary dies, the remaining portion of his Benefit will be distributed in a lump sum to the Participant's contingent Beneficiary. If a Participant dies before his Annuity Starting Date, the Participant's entire Benefit must be distributed as a Death Benefit and in any event either no later than five (5) years after the Participant's death, or if any portion of the Participant's benefit is payable to a designated Beneficiary, distributions may be made in substantially equal installments over the life or life expectancy of the designated Beneficiary commencing no later than one year after the Participant's death; provided, however, if the designated Beneficiary is the Participant's surviving spouse, the date on which distributions are required to begin shall not

be earlier than the date on which the Participant would have attained age 7-1/2.

Section 4.15-A - Joint and Survivor Annuity

(a) Notwithstanding anything in the Plan to the contrary, the Benefit, if any, of a Participant or Former Participant commencing on his Annuity Starting Date shall be Joint and Survivor Annuity, as described in subsection (b), if

(i) he was married on his Annuity Starting Date, and

(ii) he has not otherwise elected under subsection (e).

(b) The Joint and Survivor Annuity of a Participant or Former Participant shall be a Benefit, reduced as provided in subsection (c) and adjusted under the Cost of Living Adjustment (if eligible), consisting of:

(i) monthly payments to him beginning on his Annuity Starting Date and ending with the calendar month in which his death occurs with the provision that, if he dies after his Annuity Starting Date survived by the spouse to whom he was married on his Annuity Starting Date, such spouse shall receive monthly payments of 50% of such reduced Benefit adjusted under the Cost of Living Adjustment, beginning on the first day of the calendar month next following his death and ending with the calendar month on which such spouse dies, plus

(ii) as soon as both such Participant and his surviving spouse are dead, a lump sum payment to the Participant's properly designated Beneficiary or Beneficiaries other than such spouse, in an amount equal to the excess, if any, of

a. the amount remaining in the Participant Contributions Account described in Section 4.2-A (a) (ii) a of the Normal Retirement Benefit, minus

b. the aggregate of all payments made under this subsection to the Participant and his spouse.

(c) The reduced Benefit payable under this Section to a Participant or Former Participant during his lifetime shall be at a monthly rate such that his Joint and Survivor Annuity is the Actuarial Equivalent of his Early, Normal or Late Retirement Benefit.

(d) No less than thirty (30) days (unless waived by the Participant) and no more than ninety (90) days prior to the Annuity Starting Date, each Participant or Former Participant who may be affected by this Section shall be furnished, by mail or personal delivery, with a written explanation of:

(i) the terms and conditions of a qualified Joint and Survivor Annuity,

(ii) the Participant's right to make and the effect of an election to waive the qualified Joint and Survivor Annuity form of benefit,

(iii) the rights of a Participant's spouse,

(iv) the right to make, and the effect of, a revocation of a previous election to waive the qualified Joint and Survivor Annuity, and

(v) the relative values of the various Optional Retirement Benefits.

(e) A Participant or Former Participant referred to in subsection (a) may elect in writing, in the manner prescribed by the Administrator, not to receive a Joint and Survivor Annuity (in which case he shall receive his Benefit as otherwise provided in the Plan). Such an election shall be made not later than his Annuity Starting Date.

(f) The applicable election period under subsection (e) shall be the ninety (90) day period ending on the Annuity Starting Date.

(g) During the period described in subsection (f), a Participant or Former Participant who properly elected under subsection (e) not to receive a Joint and Survivor Annuity may revoke such election and after any such revocation, an election

under subsection (e) may be made again prior to the expiration of such election period.

(h) Any election made under subsection (e) will be effective only if the Participant or Former Participant's spouse signs a written consent and the spouse's signature is witnessed by a Plan representative or Notary Public. If the Participant or Former Participant establishes to the satisfaction of the Administrator that such a written consent cannot be obtained because the spouse cannot be located, the election will be deemed to be effective without the written consent of the spouse.

ARTICLE V

ORGANIZATION TRANSITION PLAN RETIREMENT BENEFIT

Section 5.1-A - Eligibility

Any Participant who:

(a) Is Employed by the Company and is a Participant in the Plan on May 23, 1989, (even though the Participant's obligation to contribute to his Participant Contributions Account may have been suspended because of being on inactive status under Section 2.4 prior thereto);

(b) Has or would have had five (5) or more years of Continuous Service on or before December 31, 1989, except for participation in the Organization Transition Plan adopted by the Executive Committee of the Board of Directors of the Company on May 30, 1989, as modified by resolutions adopted as of July 24, 1989 (hereinafter "OTP");

(c) Prior to December 31, 1989, incurs a Separation from the Service because the Participant is laid off under, or is given the opportunity by the Company in its sole discretion to participate in, the OTP; and

(d) Agrees to the conditions of participating in the OTP by, among other things, executing a general release, and elects to receive the OTP Retirement Benefit in lieu of the

severance pay benefit under Section 4.1(c) of the Hughes Transition Pay Plan,

shall become eligible for the OTP Retirement Benefit.

Section 5.2-A - The OTP Retirement Benefit

For a Participant who satisfies the eligibility requirements of Section 5.1-A and who is:

(a) Not a Highly Compensated Employee (as that term is defined in Section 414(q) of the Code), the OTP Retirement Benefit shall be:

(i) the additional Accrued Benefit the Participant would have received if:

a. the Participant was within three (3) years of age fifty-five (55), age sixty-five (65) or qualifying for the "rule of 75" benefit provided by Sections 4.7-A(c); and

b. the Participant were credited with Benefit Accrual Service in whole year increments for as long as it takes the Participant (up to a maximum of three (3) years) to reach age fifty-five (55), age sixty-five (65), or qualifying for the "rule of 75" benefit provided by Section 4.7-A(c), which ever maximizes the Participant's Accrued Benefit, and

(ii) the additional Accrued Benefit the Participant would have received if the Participant were credited with Benefit Accrual Service and his Participant Contributions Account were credited with employee Contributions that would have been made as Participant Contributions for the number of years equal to:

a. three (3) years, less

b. The number of years needed to satisfy the benefit provided in Section 5.2-A (a) (i) b.

Any benefit payable under this Section 5.2-A(a)(ii) shall not be subject to the Cost of Living Adjustment.

(b) A Highly Compensated Employee shall receive no increase in his Accrued Benefit from the Plan.

Section 5.3-A - Definition of Compensation

For purposes of calculating the Participant's Career Average Benefit and the Benefit Based on Final Average Compensation, each Participant eligible under Section 5.1-A shall have his Benefit calculated:

(a) As if the Participant's base rate of pay in effect at the time of his Separation from the Service were annualized and paid for an additional three (3) years; and

(b) By including in each such Participant's Compensation the bonus payments from the Hughes Management Incentive Plan, Hughes Supplemental Compensation Plan and Hughes Salary Adjustment Plan as if paid for 1989, 1990 and 1991 at the same level as such Participant's 1988 bonus payments.

Section 5.4-A - Cost of Living Adjustment for OT Retirement Benefit

If a Participant receives an OTP Retirement Benefit under Section 5.2-A and if such a Participant has a Separation from the Service on or after his fifty-second (52nd) birthday, a cost of living adjustment as provided by the Cost of Living Adjustment shall be used to adjust:

(a) the monthly Benefit payable without regard to the OTP Retirement Benefit; and

(b) the additional Benefit provided under Section 5.2-A (a) (i), but shall not be used to adjust the additional Benefit under Section 5.2-A (a) (ii).

Section 5.5-A - Vesting of Retirement Benefit

If a Participant satisfies the eligibility requirements under Section 5.1-A, then his Accrued Benefit Derived from Company Contributions (including OTP Retirement Benefit under the vesting provisions of Section 4.12-A(b)) shall be 100% Vested.

Section 5.6-A - Commencement of Payment of Retirement Benefit

Any Participant who satisfies the eligibility requirements under Section 5.1-A, and who is age fifty-two (52) or older, may retire and receive his Early Retirement Benefit.

Section 5.7-A - Death Benefit

The death benefit of any Participant who is eligible for the OTP Retirement Benefit under Section 5.1-A and who dies prior to benefit commencement shall be calculated and paid as a Death Benefit, but shall include the additional OTP Retirement Benefit determined in accordance with Section 5.2-A.

Section 5.8-A - Modification of OTP Benefit

Due to discrepancies between the terms of this Article and the administrative procedures by which this Article was implemented, differences have arisen between the Benefits payable under the terms of this Article and the Benefits actually projected to be paid certain Participants in the event such Participants elected to receive the OTP Retirement Benefit. In such a case, the Plan will re-determine the amount to be paid to the Participant, taking into account the purposes of the OTP Benefit and the manner in which the OTP Benefit was communicated to the Participant, and will pay the Participant as a Benefit the amount communicated to the Participant. Where the amount communicated was overstated due to subsequent changes in the interest rates used in calculating the amount of the Accrued Benefit Derived from Participant Contributions, the Plan will pay as a Benefit the amount communicated to the Participant or the amount contained on the Participant's print out of options communicated to the Participant, whichever is higher.

EXHIBIT B

This Exhibit B contains additional terms of the Plan that apply to Participants in the non-contributory benefit structure and are effective January 1, 1991, unless indicated otherwise.

ARTICLE I-B

DEFINITIONS

Section 1.1-B - Accrued Benefit

The "Accrued Benefit" of a Participant, as of his Separation from the Service, means the Participant's Normal Retirement Benefit based upon the Participant's Benefit Accrual Service accumulated to date and the Participant's Compensation paid during such Benefit Accrual Service.

Section 1.2-B - Benefit Accrual Service

"Benefit Accrual Service" of a Participant means the total, expressed in years and fractional years, of those Accounting Months (treating each Accounting Month as one-twelfth (1/12th) year, commencing January 1, 1991, for any part or all of which the Participant was employed by the Company following the Participant's one year Anniversary Date, but excluding those Accounting Months during which: the Participant was participating in, or eligible to participate in, any other qualified defined benefit plan of a member of the Controlled Group; the Participant did not receive Compensation from the Company; or the Participant did not satisfy the eligibility requirements of Section 2.1-B(a).

Section 1.3-B - Compensation

"Compensation" of a Participant for the period ending with the first payroll week in February 1991, shall have the same meaning as set forth in Section 1.7-A(a) of Exhibit A, and "Compensation" for the remaining part of the Plan Year ending November 30, 1991, and thereafter for any Plan Year.

(a) means his base pay, Company sick leave or paid time off allowance pay, payments of state unemployment compensation for disability while receiving Company sick leave pay, lead person and shift differentials, payments of workers' compensation for disability while receiving Company sick leave pay, payment for overtime hours, vacation actually taken, and holiday, bereavement or personal leave pay, sales commissions, bonuses, jury duty, military training pay when such payments are made by the Company (or paid by a governmental agency and used as an offset by the Company) amounts paid under the Hughes Salary Adjustment Plan, Hughes Supplementary Compensation Plan, the Hughes Management Incentive Plan and the Hughes Investment Management Company Incentive Plan, and amounts deferred by a Participant which are contributed by the Company under a cash or deferred arrangement under Section 401(k) of the Code and amounts deferred by a Participant to a flexible spending account in a Company cafeteria plan under Section 125 of the Code, but

(b) shall exclude Compensation of any Participant in excess of $209,200, as adjusted by the Secretary of the Treasury at the same time and in the same manner as under Section 415(d) of the Code, except that the dollar increase in effect on January 1st of any calendar year Company on or after January 1, 1991, is effective for the Plan Year that next commences, shall exclude any compensation paid or not paid by a Company (unless specifically included in paragraph (a)), payments for vacation not taken, pay for sick time not taken, tax differentials, retainers, insurance benefits, hazard area premium, domestic field and foreign service allowances, allowances for post, quarters, education, dual housing and home leave, company paid premiums, capture and detention pay, sea duty premium, flight duty pay, compensable travel pay, and any other special payments or allowances not specifically included in paragraph (a).

Section 1.4-B - Covered Compensation

"Covered Compensation" shall mean for any Plan Year the average (without indexing) of the Social Security Taxable Wage Base in effect for each calendar year during the thirty-five (35) year period ending with the calendar year in which a Participant attains or will attain his Social Security Retirement Date. In determining a Participant's Covered Compensation for a Plan Year, the Social Security Taxable Wage Base for the current and any subsequent Plan Year shall be assumed to be the same as in effect for the Plan Year for which the determination is being made. A Participant's Covered Compensation for any Plan Year after the thirty-five (35) year period is the covered compensation for the Plan Year in which the Participant attained Social Security Retirement Date. A Participant's Covered Compensation shall be automatically adjusted for each Plan Year in accordance with this Section.

Section 1.5-B - Death Benefit

"Death Benefit" means the Benefit provided following the death of a Participant determined under Section 4.8-B.

Section 1.6-B - Early Retirement Benefit

"Early Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.4-B.

Section 1.7-B - Joint and Survivor Annuity

"Joint and Survivor Annuity" of a Participant or Former Participant means the form of Benefit payable to or with respect to him under Section 4.11-B.

Section 1.8-B - Late Retirement

"Late Retirement" of a Participant means his retirement upon his Late Retirement Date.

Section 1.9-B - Late Retirement Benefit

"Late Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.6-B.

Section 1.10-B - Normal Retirement Benefit

"Normal Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.2-B.

Section 1.11-B - Optional Retirement Benefit

"Optional Retirement Benefit" of a Participant or Former Participant means the optional form of Benefit payable to or with respect to him under Section 4.10-B.

Section 1.12-B - Social Security Taxable Wage Base

"Social Security Taxable Wage Base" means the contribution and benefit limit in effect under Section 3121(a) of the Code.

Section 1.13-B - Vested Retirement Benefit

"Vested Retirement Benefit" of a Participant or Former Participant means the Benefit which is nonforfeitable in accordance with Section 4.9-B.

ARTICLE II-B

ELIGIBILITY

Section 2.1-B - Requirements for Participation

(a) Any Employee who has completed one thousand (1,000) Hours of Service during the one year period commencing with his first Hour of Service or commencing with any subsequent Anniversary Date, but excluding any Hour of Service with any member of the Controlled Group prior to such time the member became part of the Controlled Group with Hughes, and

(i) is not an active or suspended Participant in the contributory benefit structure under Exhibit A, and

(ii) is not an Employee in a Bargaining Unit, and

(iii) is on the United States payroll of his Company (as maintained by such Company in accordance with its established practice),

shall become a Participant on the entry date determined as the later of either January 1, 1991, or the first Anniversary Date coincident with or next following his satisfaction of such requirements.

(b) Any Participant whose participation is terminated by a Separation from the Service shall again become a Participant upon again becoming an Employee and complying with the requirements of subsection (a) (i), (ii) and (iii). There shall be no duplication of any previously Accrued Benefits by reason of a Participant's readmission to the Plan.

Section 2.2-B - Forfeitures

If a Participant has a Separation from the Service for any reason prior to his acquisition of a fully Vested Retirement Benefit, the unvested portion of his Accrued Benefit shall be forfeited when the number of his consecutive Break in Service Years equals five (5).

ARTICLE IV-B

RETIREMENT, TERMINATION OR DEATH

Section 4.1-B - Normal Retirement

A Participant shall be entitled to Normal Retirement Benefits hereunder on his Normal Retirement Date, unless the Participant elects his Early Retirement Benefit or Late Retirement Benefit.

Section 4.2-B - Normal Retirement Benefit

A Participant who retires on his Normal Retirement Date shall receive a Normal Retirement Benefit, which, subject to the Optional Retirement Benefit and Joint and Survivor Annuity, shall equal a monthly payment on the first day of each month commencing with his Normal Retirement Date and ending with the last such payment before his death equal to:

(a) The product of:

(i) the factor of .015,

(ii) that portion of his Benefit Accrual Service which is included in the first 35 years of Total Benefit Accrual Service

(iii) his Final Average Monthly Compensation; minus

(b) The product of:

(i) the factor of .006,

(ii) that portion of his Benefit Accrual Service which is included in the first 35 years of Total Benefit Accrual Service, and

(iii) his Final Average Monthly Compensation not in excess of Covered Compensation; plus

(c) The product of:

(i) the factor of .005,

(ii) that portion of his Benefit Accrual Service which is included in the Total Benefit Accrual Service in excess of 35 years, and

(iii) his Final Average Monthly Compensation.

In the event the Normal Retirement Date occurs prior to a Participant's Social Security Retirement Date, then the Benefit hereunder shall be actuarially reduced in accordance with the terms of Early Retirement Benefit.

Section 4.3-B - Early Retirement

A Participant shall be entitled to his Early Retirement Benefit hereunder on his Early Retirement Date.

Section 4.4-B - Early Retirement Benefit

A Participant or Former Participant who retires on his Early Retirement Date shall receive an Early Retirement Benefit which, subject to the provisions of the Optional Retirement Benefit, the Joint and Survivor Annuity and the vesting provisions of Section 4.9-B, shall consist of a monthly payment on the first day of each calendar month commencing with his Early Retirement Date and ending with the last such payment before his death. The monthly payment shall equal his Vested Accrued Benefit payable as the Normal Retirement Benefit reduced by 1/2% for each month the Participant or Former Participant's Early Retirement Date precedes his Social Security Retirement Date, except there shall be no reduction for a Participant (but no a Former Participant) if the Participant is within three (3) years of Social Security Retirement Date or older and has ten (10) or more years of Continuous Service.

Section 4.5-B- Late Retirement

A Participant shall be entitled to his Late Retirement Benefit hereunder on his Late Retirement Date, or on his Annuity Starting Date if occurring later than his Normal Retirement Date.

Section 4.6-B - Late Retirement Benefit

A Participant who retires on his Late Retirement Date, shall receive a Late Retirement Benefit which, subject to the provisions of the Optional Retirement Benefit and the Joint and Survivor Annuity, shall consist of a monthly payment on the first day of each calendar month commencing with his Late Retirement Date, and ending with the last such payment before his death, equal to his Normal Retirement Benefit but with Benefit Accrual Service, Covered Compensation and Final

Average Monthly Compensation determined as of his Late Retirement Date.

Section 4.7-B - Actuarial Equivalence

The Participant's Optional Retirement Benefit or the Joint and Survivor Annuity Benefit shall, except for the vesting provisions under Section 4.9-B, be the Actuarial Equivalent of his Early, Normal, or Late Retirement Benefit, such Equivalent being computed as of his Annuity Starting Date.

Section 4.8-B - Death Benefit

(a) If a Participant's age is fifty-five (55) or older, has a Separation from the Service due to his death, or has a Separation from the Service because of retirement but dies prior to the first day of the month coinciding with or next following retirement within which the initial payment of any benefit is or would be payable to him, and leaves a surviving spouse, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall in accordance with Rules of the Plan receive a monthly payment on the first day of each calendar month commencing with the month following the month of such Participant's death, and continuing through the month of such spouse's death, in an amount equal to 100% of the monthly benefit which such spouse would have received had the Participant retired immediately prior to his death and elected under Section 4.10-B (b) (i) a of the Optional Retirement Benefit to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be, naming such spouse as Contingent Annuitant and providing that such monthly payments to the surviving Contingent Annuitant after the Participant's death should be equal to 100% of the payments to the Participant during his life, and the monthly Benefit which such spouse would have received under the Joint and Survivor Annuity had the Participant retired immediately prior to his death and elected under the Joint and Survivor Annuity to receive monthly payments of his Early Retirement Benefit,

Normal Retirement Benefit or Late Retirement Benefit as the case may be.

(b) Unless the provisions of Section 4.8-B(a) of the Death Benefit apply, if a Participant dies with a Vested Retirement Benefit apply, if a Participant dies with a Vested Retirement Benefit after a Separation from the Service, and such death is prior to the due date of the first monthly Benefit payable to him under the Plan and if he is survived by the spouse to whom he was married throughout the three hundred and sixty-five (365) day period immediately preceding his death, then regardless of whether such spouse is designated as his sole primary Beneficiary, such spouse shall receive a survivor annuity consisting of:

(i) if the Former Participant dies after his earliest retirement age, such spouse shall, in accordance with the rules of the Plan, receive a monthly payment to such spouse on the first day of each calendar month commencing with the month following the month of such Former Participant's death, and continuing through the month of such spouse's death, in an amount equal to 100% of the monthly Benefit which such spouse would have received under the Joint and Survivor Annuity had the Former Participant retired immediately prior to his death and elected under the Joint and Survivor Annuity to receive monthly payments of his Early Retirement Benefit, Normal Retirement Benefit or Late Retirement Benefit, as the case may be; or

(ii) if the Participant or Former Participant dies prior to his earliest retirement age, a monthly payment commencing on the first day of the calendar month following the month in which the Participant or Former Participant would have attained his earliest retirement age and ending with the calendar month in which the spouse dies, equal to 50% of the monthly amount the Participant or Former Participant would have received if he retired electing a Joint and Survivor Annuity, and if such Participant had:

a. a Separation from the Service on the date of death,

b. survived to the earliest retirement age,

c. retired with a 50% Joint and Survivor Annuity at the earliest retirement age,

d. died on the day after the day on which such Participant would have attained the earliest retirement age, and

e. in the case of an individual who has a Separation from the Service before the date of such individual's death, subparagraph a shall not apply.

Section 4.9-B - Vested Retirement Benefit

Each Participant shall be entitled to a Vested Retirement Benefit in the amount provided in this Section. In the event of his Separation from the Service prior to his Normal Retirement Date, except for the Joint and Survivor Annuity and the Death Benefit, such Participant shall upon his Normal Retirement Date become entitled to a Normal or Optional Retirement Benefit, or upon his Early Retirement Date may receive an Early or Optional Retirement Benefit, as he shall elect, or in the absence of such election, as determined under the provisions of the Normal Retirement Benefit, the Optional Retirement Benefit and Joint and Survivor Annuity, all in an amount Actuarially Equivalent to that percentage of his Accrued Benefit determined on the basis of his Years of Vesting Service as follows:

Years of Vesting Service	Vested Percentage
Less than 5	0%
5 or more	100%

A Participant's Vested Retirement Benefit shall in no event be diminished because of any subsequent reductions in his

Vesting Service. A Participant's Accrued Benefit to the extent not forfeited under Section 2.3 or paid as a Death Benefit shall become 100% Vested if he is then employed by a member of the Controlled Group on his sixty-fifth (65th) birthday.

Section 4.10-B - Optional Retirement Benefit

A Participant entitled to receive a Normal, Early, or Late Retirement Benefit shall receive the 50% Joint and Survivor Annuity (if applicable) unless he elects not to receive such annuity, elects instead to receive a distribution in accordance with subsection (a), (b), (c) or (d) and his spouse consents in writing to such election in accordance with Section 4.11-B(h). A Participant to whom a Joint and Survivor Annuity does not apply and who makes no election under this Section shall receive a Benefit in accordance with subsection (a). A Participant may not make or change an election hereunder after his Annuity Starting Date. A Participant may elect, in accordance with Rules of the Plan, to receive his Benefit in any one of the following manners:

(a) A Normal, Early or Late Retirement Benefit, as the case may be,

(b) A Benefit consisting of monthly payments commencing on his Annuity Starting Date:

(i) in the form of a joint and survivor annuity option payable to the Participant for his life, and monthly payments to his Beneficiaries or his Contingent Annuitants for life (in amounts as selected by the Participant equal to a survivor annuity of 50%, 75% or 100% of the monthly amount paid to such Participant), or

(ii) in the form of a period certain and continuous option payable to the Participant and his Beneficiaries over the later of a period certain for a guaranteed number of payments of ten (10) years or the life of the Participant; or

(iii) in the form of a period certain option to the Participant and his Beneficiaries for a period certain for a guaranteed number of payments (for a period as selected by the Participant of ten (10) or fifteen (15) years).

(c) No Optional Retirement Benefit may be selected where the Beneficiary or Contingent Annuitant is other than the spouse, unless such option will assure that at least 50% of the present value of the Benefit available for distribution is payable within the life expectancy of the Participant.

(d) If a Participant dies after his Annuity Starting Date, the remaining portion of his Benefit, if any, may continue to be distributed at least as rapidly as under the method of distribution being used prior to the Participant's death. If a Participant dies before his Annuity Starting Date, the Participant's entire Benefit must be distributed as a Death Benefit and in any event either no later than five (5) years after the Participant's death, or if any portion of the Participant's benefit is payable to a designated Beneficiary, distributions may be made in substantially equal installments over the life or life expectancy of the designated Beneficiary commencing no later than one year after the Participant's death; provided, however, if the designated Beneficiary is the Participant's surviving spouse, the date on which distributions are required to begin shall not be earlier than the date on which the Participant would have attained age 70-1/2.

Section 4.11-B - Joint and Survivor Annuity

(a) Notwithstanding anything in the Plan to the contrary, the Benefit, if any, of a Participant or Former Participant commencing on his Annuity Starting Date shall be a Joint and Survivor Annuity, as described in subsection (b), if

(i) he was married on his Annuity Starting Date, and

(ii) he has not otherwise elected under subsection (e).

(b) The Joint and Survivor Annuity of a Participant or Former Participant shall be a Benefit, reduced as provided in

subsection (c), consisting of monthly payments to him beginning on his Annuity Starting Date and ending with the calendar month in which his death occurs with the provision that, if he dies after his Annuity Starting Date survived by the spouse to whom he was married on his Annuity Stating Date, such spouse shall receive monthly payments of 50% of such reduced Benefit adjusted, beginning on the first day of the calendar month next following his death and ending with the calendar month in which such spouse dies.

(c) The reduced Benefit payable under this Section to a Participant or Former Participant during his lifetime shall be at a monthly rate such that his Joint and Survivor Annuity is the Actuarial Equivalent of his Early, Normal or Late Retirement Benefit.

(d) No less than thirty (30) days (unless waived by the Participant) and no more than ninety (90) days prior to the Annuity Starting Date, each Participant or Former Participant who may be affected by this Section shall be furnished, by mail or personal delivery, with a written explanation of:

(i) the terms and conditions of a qualified Joint and Survivor Annuity,

(ii) the Participant's right to make and the effect of an election to waive the qualified Joint and Survivor Annuity form of benefit,

(iii) the rights of a Participant's spouse,

(iv) the right to make, and the effect of, a revocation of a previous election to waive the qualified Joint and Survivor Annuity, and

(v) the relative values of the various Optional Retirement Benefits.

(e) A Participant or Former Participant referred to in subsection (a) may elect in writing, in the manner prescribed by this Administrator, not to receive a Joint and Survivor Annuity (in which case he shall receive his Benefit as otherwise

provided in the Plan). Such an election shall be made not later than his Annuity Starting Date.

(f) The applicable election period under subsection (e) shall be the ninety (90) day period ending on the Annuity Starting Date.

(g) During the period described in subsection (f), a Participant or Former Participant who properly elected under subsection (e) not to receive a Joint and Survivor Annuity may revoke such election and after any such revocation, an election under subsection (e) may be made again prior to the expiration of such election period.

(h) Any election made under subsection (e) will be effective only if the Participant or Former Participant's spouse signs a written consent and the spouse's signature is witnessed by a Plan representative or Notary Public. If the Participant or Former Participant establishes to the satisfaction of the Administrator that such a written consent cannot be obtained because the spouse cannot be located, the election will be deemed to be effective without the written consent of the spouse.

* * * *

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and RICHARD E. HOOK,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CIV-92-031-TUC JMR

SUPPLEMENTAL DECLARATION OF BERTHA E. GARRISON

I, Bertha E. Garrison, hereby declare as follows:

1. I am a citizen of the United States and a resident of Los Angeles, California. I am presently employed by Hughes Aircraft Company ("Hughes") in the position of Manager Financial Planning-Treasury, and I have been employed by Hughes since 1990. I have either personal knowledge of or access to records containing the facts set forth in this Declaration and, if called as a witness, could and would competently testify to them under oath.

2. I have held the position of Manager Financial Planning-Treasury at Hughes since February 1990. In this position I am responsible for assisting in administering the financial aspects of Hughes' benefit programs, including the retirement plan for non-bargaining employees. Records concerning the Hughes Non-Bargaining Retirement plan (the "Plan"), including copies of the Plan itself, its amendments and the related trust agreements, are within my direction and control. These records are maintained in the ordinary course of business and I utilize these records in performing my functions for Hughes.

3. As of the beginning of 1991, approximately 60,000 Plan participants (Ann L. Verhey's Declaration of March 12, 1992, shows 66,000, but that figure reflects a typographical error) were accruing benefits under, receiving benefits under, or were terminated employees with vested benefits in, the Plan's contributory benefits structure. Of that total of approximately 60,000, more than 39,000 were active employees then accruing benefits under the contributory benefits structure of the Plan.

4. Since October 12, 1976, to date, Hughes has been party to a Trust Agreement pursuant to the Plan. A true and correct copy of that Trust Agreement, which remains in effect today, is attached hereto as Exhibit "3" and incorporated herein by this reference. As of today the Trust Agreement consists of the Third Amendment to the Trust Agreement Pursuant to Hughes' Retirement Plan, executed on March 15, 1979, a fourth amendment to the Trust Agreement executed on December 12, 1980, a fifth amendment to the Trust Agreement executed on October 31, 1985, and a sixth amendment to the Trust Agreement executed on December 14, 1989, all of which are attached.

I declare, under penalty of perjury and under the laws of the State of California and the United States of America, that the foregoing is true and correct. This declaration is executed on May 5, 1992, at Los Angeles, California.

/s/ Bertha E. Garrison
Bertha E. Garrison

EXHIBIT 3

SIXTH AMENDMENT
TO THE TRUST AGREEMENT PURSUANT TO
HUGHES NON-BARGAINING RETIREMENT PLAN
AND
HUGHES BARGAINING RETIREMENT PLAN

THIS AGREEMENT, by and between HUGHES AIRCRAFT COMPANY (hereinafter referred to as the "Company" or "Companies") and BANKERS TRUST COMPANY (hereinafter referred to as "Trustee"), evidences the terms of an Amendment to the Trust Agreement Pursuant to the Hughes Non-Bargaining Retirement Plan and the Hughes Bargaining Retirement Plan (the "Plans"). This Amendment, together with the Third Amendment executed on the 15th day of March, 1979, the Fourth Amendment executed on the 12th day of November, 1980, and the Fifth Amendment executed on the 31st day of October, 1985, constitutes the entire Trust Agreement.

a. Section 1.01 shall be deleted in its entirety and the following substituted in its place:

> It shall be the duty of the Trustee to receive funds for and to hold the Trust Fund (as defined below); to manage, invest, and reinvest the Trust Fund, except as provided in Section 1.03(d); to collect and hold the increase, earnings, and profits thereon; and to make payments from the Trust Fund; all as herein and in the Plan provided. "Trust Fund" herein shall mean all cash and other property contributed, paid or delivered to the Trustee hereunder, all investments made therewith and proceeds thereof and all earnings and profits thereon, less payments, transfers or other distributions which, at

the time of reference, shall have been made by the Trustee, as authorized herein. The Trust Fund shall include all evidences of ownership, interest or participation in an Investment Vehicle, but shall not, solely by reason of the Trust Fund's investment therein, be deemed to include any assets of such Investment Vehicle.

* * * *

Executed this 14th day of December, 1989.

HUGHES AIRCRAFT COMPANY

By /s/ [illegible]
President and Chief Operating Officer

By /s/ [illegible]

By /s/ [illegible]
Executive Vice President and
Chief Financial Officer

BANKERS TRUST COMPANY

By /s/ [illegible]

By

APPROVED AS TO FORM:

By /s/ [illegible]
General Counsel
Hughes Aircraft Company

* * * *

FOURTH AMENDMENT
TO THE TRUST AGREEMENT PURSUANT TO
HUGHES NON-BARGAINING RETIREMENT PLAN
AND
HUGHES BARGAINING RETIREMENT PLAN

THIS AGREEMENT, executed on the 12th day of December, 1980, by and between HUGHES AIRCRAFT COMPANY on behalf of itself and certain related companies which are signatories to the HUGHES NON-BARGAINING RETIREMENT PLAN and the HUGHES BARGAINING RETIREMENT PLAN (as shown on the signature page hereof) or which subsequently adopt either Plan or both Plans and become signatories hereto, hereinafter referred to as the "Company" or "Companies" and Bank of America National Trust and Savings Association, hereinafter referred to as the "Trustee."

RECITALS

A. Effective as of January 1, 1951, the Company adopted and established the Hughes Retirement Plan. A Trust Agreement pursuant to Hughes Retirement Plan (hereinafter Trust Agreement) was adopted on October 12, 1976, to comply with the requirements of the Employee Retirement Income Security Act of 1974. The First and Second Amendments to the Trust Agreement were adopted on June 19 and 20, 1978, respectively. The Third Amendment to the Trust Agreement was executed on March 15, 1979. The Third Amendment revised certain provisions dealing with the insurance contracts and restated the Trust Agreement in its entirety.

B. Effective January 1, 1980, the Hughes Retirement Plan was split into two Plans. One Plan is known as the Hughes Non-Bargaining Retirement Plan and the other Plan is known as the Hughes Bargaining Retirement Plan. Although each Plan is operated separately, the Plans provide for contributions

by the Companies and the Participants to be held in trust, invested, and paid out by the Trustee or the Insurance Company to Participants and their Beneficiaries and Contingent Annuitants or representatives for the accomplishment of the purposes of said Plans pursuant to the provisions of the Trust Agreement.

C. The Plans are qualified under Section 401(a), and the Trust is exempt from tax under Section 501(a), of the Internal Revenue Code and regulations issued pursuant thereto, and is exempt from tax under similar provisions of the California Revenue and Taxation Code, and the Plan and Trust comply with the requirements of the Employee Retirement Income Security Act of 1974.

NOW THEREFORE, the Companies hereby adopt the Fourth Amendment to the Trust Agreement pursuant to Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan.

1. The name of the Trust Agreement shall be the Trust Agreement pursuant to the Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan.

2. Whenever the term "Plan is used in the Trust Agreement, such term shall mean both the Hughes Non-Bargaining Retirement Plan and the Hughes Bargaining Retirement Plan, unless the context clearly indicates otherwise.

3. A new Section 1.04(r)(ix) shall be added to read as follows:

"(ix) To transfer monies from the Trust Fund to Benefit Disbursement Account or Accounts, which shall be opened and maintained by the Administrator at a commercial branch of a national or state bank for the purposes of paying benefits under the Plan or defraying administrative expenses of the Plan or this Trust. The Administrator shall distribute monies from each account to such persons, in

such manner, at such time and in such amounts as the Administrator shall determine. In no event shall the Trustee have any responsibility respecting the application of such distributions, or for determining or inquiring into whether such distribution are in accordance with the Plan."

4. Except as specifically provided herein, the provisions of the Third Amendment to the Trust Agreement executed on March 15, 1979 shall remain in full force and effect.

Executed at Los Angeles, California, on the day and year first written above.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION	HUGHES AIRCRAFT COMPANY
By G. Michael Watry Trust Officer	By T. V. Keene Vice President-Finance
By E. C. Thayer Trust Officer	By John H. Richardson President

APPROVED:

R. F. Alden
General Counsel
Hughes Aircraft Company

THIRD AMENDMENT TO THE TRUST AGREEMENT PURSUANT TO HUGHES RETIREMENT PLAN

This is an amended Agreement of trust made and dated this 15th day of March, 1979, by and between Hughes Aircraft Company on behalf of itself and certain related companies which are signatories to the Hughes Retirement Plan (as shown on the signature page hereof) or which subsequently adopt the Plan and become signatories hereto, hereinafter referred to as the "Company" or "Companies," and Bank of America National Trust and Savings Association, hereinafter referred to as the "Trustee."

RECITALS

A. Effective as of January 1, 1951, the Companies adopted and established the Hughes Retirement Plan. An Agreement of Trust was adopted on October 12, 1976 to comply with requirements of the Employee Retirement Income Security Act of 1974. The First and Second Amendments to the Trust were adopted on June 19 and June 20, respectively. This Third Amendment revises certain provisions dealing with insurance contracts and restates the Trust Agreement in its entirety.

B. Said Plan provides for contributions by the Companies and Participants to be held in trust, invested, and paid out by the Trustee or the Insurance Company to Participants and their Beneficiaries and Contingent Annuitants or representatives for the accomplishment of the purposes of said Plan.

C. The Trust is intended to qualify under Sections 401 and 501 of the Internal Revenue Code and regulations issued pursuant thereto and similar provisions of the California Revenue and Taxation Code as a tax-exempt trust, and to comply with the requirements of the Employee Retirement Income Security Act of 1974.

AGREEMENT

NOW, THEREFORE, the Companies hereby adopt the Third Amendment to the Trust Agreement Pursuant to Hughes Retirement Plan, as hereinafter set forth, and the Trustee agrees to receive and hold any and all cash and property which have been or may be paid or delivered to it as Trustee hereunder from time to time in trust for the uses and purposes and upon the terms and conditions hereinafter stated.

ARTICLE I

POWERS, DUTIES AND RIGHTS OF TRUSTEE

Section 1.01 - General

It shall be the duty of the Trustee to hold the funds from time to time received by it from the Companies and Participants which, together with the increase, earnings and profits thereon, shall constitute the Trust Fund; to manage, invest, and reinvest the Trust Fund, except as provided in Section 1.03(d); to collect and hold the increase, earnings, and profits thereon; and to make payments from the Trust Fund; all as herein and in the Plan provided.

Section 1.02 - Subfunds

(a) Unless otherwise directed by the Administrator, the contributions of each Company and its Employees, plus the gains and minus the losses thereon, shall be allocated to a separate subfund attributable to such Company. Except as provided in Section 6.7(c) of the Plan, such separate subfunds shall be maintained solely for internal accounting purposes. The Administrator shall determine the initial allocation of assets to a subfund.

(b) The Trustee shall, at the request of the Administrator on behalf of any Company, maintain more than one subfund for the Company, allocating to it such portion of the assets attributable to such Company as the Administrator specifies.

(c) As directed by the Administrator, the cost of providing Benefits for Participants who were employed by a Company

shall be charged to such Company's subfund or, if it has more than one subfund, to the subfund or subfunds it designates.

(d) An asset of any subfund may consist of an undivided interest in any asset held in common with any other subfund (unless otherwise specified in writing by the Administrator).

Section 1.03 - Status of Fiduciaries

(a) The Trustee shall be a fiduciary within the meaning of Section 3(21)(A) of ERISA and shall perform its duties and exercise its powers as such subject to all provisions of the Plan, the Trust Agreement, ERISA and other applicable laws and regulations governing fiduciaries.

(b) Subject to Sections 403(c), 4042 and 4044 of ERISA, the Trustee and each fiduciary identified as such in the Plan shall discharge their duties with respect to the Plan solely in the interests of the Participants, Beneficiaries and Contingent Annuitants and

(i) for the exclusive purpose of

a providing benefits to such persons

and

b defraying reasonable expenses of administering the Plan, but only as required in Sections 1.04(r) and 1.09 of this Trust Agreement;

(ii) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims;

(iii) by diversifying the investments of the Plan (taking into account not only the assets it manages but all of the assets of the Plan, including any group annuity contracts, and considering the underlying investments represented by any interest in a pooled fund, investment company or group annuity contract) so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(iv) in accordance with the documents and instruments governing the Plan and Trust Fund insofar as such documents and instruments are consistent with the provisions of Title I of ERISA.

(c) The Trustee shall have complete investment management responsibilities over all assets of the Trust Fund except that

(i) it shall have no such responsibilities over assets in an investment account managed pursuant to Section 1.07 by a fiduciary other than the Trustee,

and

(ii) it shall have no such responsibility with respect to any group annuity contract which may be an asset of the Trust.

(d) Subject to the limitations of subsection (b) and Section 1.04(b), the Trustee may invest and hold any or all of the assets over which it has investment management responsibility in assets referred to in Section 1.04(b).

<u>Section 1.04</u> - <u>Powers and Duties of Investment, Management and Distribution</u>

Subject to the limitations and requirements of Sections 1.03 and 1.07, the provisions of ERISA and other applicable laws, the Trustee shall have full, power to invest and reinvest and/or cause to be invested the assets of the Trust Fund in such manner as it deems beneficial and appropriate for the Trust Fund without being limited or bound by any rule or custom relating to investments by trustees, as follows:

* * * *

(r) As directed by the Administrator:

(i) Directly, or through an annuity contract mentioned in paragraph (viii), to pay or cause to be paid the benefits provided in the Plan to the persons entitled thereto under the Plan, and in the amounts and in the manner specified.

(ii) To compensate from the Trust Fund such executive, consultant, actuarial, accounting, investment, appraisal, administrative, clerical, secretarial, medical, custodial, depository and legal firms, personnel and other employees or assistants as are engaged by the Administrator in connection with the administration of the Plan or the investment of the Trust Fund, as the case may be, and to pay from the Trust Fund the necessary expenses of such firms, personnel and assistants.

(iii) To impose a reasonable charge to cover the cost of furnishing to Participants, Beneficiaries or Contingent Annuitants upon their written request documents as required under Section 104(b)(4) of ERISA (but not for furnishing information, statements or documents as required by Section 104(b)(1), (2) or (3) or Section 104(c) or Section 105(a) or (c) of ERISA).

(iv) To act upon proper written directions of the Companies, the Administrator or any other named fiduciary or any investment manager including directions given by photostatic tele-transmission using facsimile signature.

(v) To pay premiums for plan termination insurance to the Pension Benefit Guaranty Corporation.

(vi) To pay from the Trust Fund the expenses reasonably incurred in the administration of the Trust Fund or the Plan, as provided in the Plan.

(vii) To maintain insurance for such purposes, in such amounts and with such companies as the Administrator shall elect, including insurance to cover liability or losses occurring by reason of the acts or omissions of fiduciaries (but only if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary).

(viii) To enter into, modify, renew and terminate contracts of any type with one or more insurance companies and to pay or deposit all or any part of the Trust Fund thereunder; to provide in any such contract for the investment of all or any part of funds so deposited with the insurance company in separate accounts, commingled or otherwise, and to provide for the purchase of annuities for retired Participants, including variable annuities; to exercise and claim all rights and benefits granted to the contract holder by any such contracts.

* * * *

ARTICLE IV
AMENDMENT

Section 4.01 - Power to Amend

The Administrator and the Trustee shall have the right at any time and from time to time to enter into agreements modifying or amending this Trust Agreement in whole or in part.

Section 4.02 - Limitation on Amendment

No amendment shall be made at any time under which any part of the Trust Fund may be diverted to purposes other than for the exclusive benefit of Participants and their Beneficiaries and Contingent Annuitants or which sh... decrease the percentage or amount of the interest of any Participant which shall theretofore have become Vested.

Section 4.03 - Conformity with Law

Notwithstanding anything herein to the contrary, this Trust Agreement may be amended prospectively or retroactively at any time by the Administrator or its duly authorized representative, upon reasonable notice to the Trustee, if deemed necessary to conform to the provisions and requirements of ERISA or the Internal Revenue Code or regulations promulgated pursuant thereto in order to maintain

the tax-exempt status hereof thereunder, or to conform to the provisions and requirements of any law, regulation, order or ruling affecting the character or purpose of the Plan or Trust.

* * * *

ARTICLE VI

DURATION AND TERMINATION

Section 6.01 - Irrevocability

This Trust is hereby declared to be irrevocable.

Section 6.02 - Duration

This Trust shall continue in full force and effect for the maximum period of time permitted by law and in any event until the expiration of twenty-one years after the death of the last surviving person who was living at the time of execution hereof who at any time becomes a Participant in the Plan, unless this Trust is sooner terminated in accordance with the Plan.

ARTICLE VII

MISCELLANEOUS

Section 7.01 - Successor Company; Additional Companies

(a) If any successor to a Company continues the Plan, it shall concurrently become a successor first party to this Trust Agreement by giving written notice of its adoption of the Plan and this Trust Agreement to the Trustee by duly authorized persons, which notice shall constitute such successor a signatory hereto.

(b) If any other corporation adopts the Plan, in accordance with the provisions therein, it may become an additional Company and party to this Trust Agreement by giving written notice of its adoption of the Plan and of this Trust Agreement to the Trustee, which notice shall constitute such additional Company a signatory hereto.

Section 7.02 - Relation to Plan

All words and phrases used herein shall have the same meaning as in the Plan, and this Trust Agreement and the Plan shall be read and construed together. Whenever in the Plan it is provided that the Trustee shall act as therein prescribed, it shall be and is hereby authorized and empowered to do so for all purposes as fully as though specifically so provided herein; provided, however, that no amendments to the Plan made subsequent to the date hereof which substantially increase the duties or responsibilities of the Trustee, or substantially reduce its immunities, shall bind or affect the Trustee until approved in writing by the Trustee. The Administrator shall furnish the Trustee with copies of the Plan and all amendments.

Section 7.03 - Use of Trust Funds

Under no circumstances shall any contributions by a Company to the Trust or any part of the Trust Fund be recoverable by any Company from the Trustee or from any Participant or former Participant, his Beneficiaries, or any other person, or be used for or diverted to purposes other than for the exclusive purposes of providing benefits to Participants and their Beneficiaries and Contingent Annuitants; provided, however, that the portion, if any, of the Trust Fund not required for the satisfaction of all liabilities to Participants, their Beneficiaries and Contingent Annuitants shall, upon termination of the Plan, revert to the Companies.

Section 7.04 - Location of Fund Assets

Except as authorized by the Secretary of Labor by regulation, the indicia of ownership of any assets of the Fund and Plan shall not be maintained outside the jurisdiction of the District Courts of the United States.

Section 7.05 - Partial Invalidity

If any provision of the Trust Agreement is held to be illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining portions of the Trust Agreement, unless

such illegality or invalidity prevents accomplishment of the objectives and purposes of the Trust Agreement and the Plan. In the event of any such holding, the parties will immediately amend the Trust Agreement as necessary to remedy any such defect.

Section 7.06 - Construction

This Trust Agreement shall be construed, administered, and enforced according to ERISA and the Internal Revenue Code and where State law is applicable, under California laws, fairly and equitably, and in accordance with the purposes of the Plan.

Executed at Los Angeles, California, the day and year first written above.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION	HUGHES AIRCRAFT COMPANY
By /s/ [illegible] "Trustee"	By /s/ [illegible] Vice President-Finance
By /s/ [illegible] "Trustee"	By /s/ [illegible] President "Companies"
Approved as to form:	Approved
LATHAM & WATKINS	By /s/ Richard F. Allen Richard F. Alden General Counsel Hughes Aircraft Co.
By /s/ Ethan Lipsig Ethan Lipsig Attorneys for Companies	

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK, individually and on behalf of all those similarly situated,

Plaintiffs,

-against-

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Defendants.

CV 92-4020-RG (Bx)

AFFIDAVIT OF STANLEY I. JACOBSON

STATE OF ARIZONA)
) ss.:
COUNTY OF TUCSON)

STANLEY I. JACOBSON, being duly sworn deposes and says:

1. I am a named plaintiff and submit this affidavit in opposition to defendant's motion to dismiss to show to the court that the old Contributory Plan and the new Non-Contributory plan are separate benefit plans.

2. Attached hereto as exhibit "A" is a letter dated May 2, 1990 signed by Gerald A. Monty, Director of Human

Resources of Hughes 1990 signed by Gerald A. Monty, Director of Human Resources of Hughes Missile System Group. The letter announces the creation of "a new retirement plan." The letter states that:

> "Current employees will have a choice of the between the existing retirement plan and the new plan. The new retirement plan will not require employee contributions and will have benefits commensurate with a non-contributory plan."

3. Thus, Mr. Monty, a Hughes official, refers to the new non-contributory plan as a "new plan" even though defendants attempt now to characterize it as an amendment to the Contributory Plan.

4. Annexed as exhibit "B" hereto is a brochure sent by Hughes to contributory plan participants explaining the differences between the Contributory and new Non-Contributory plans. A perusal of document shows that there is absolutely nothing in common between the contributory and non-contributory plans. The contributory plan is a mandatory plan which all new employees and employees who did not enroll in the contributory plan are covered by. There is no election of options. No new employees may participate in the contributory plan. The contributory plan was elective and required a monthly contribution by the employees. The new non-contributory plan is mandatory and requires no contributions.

5. The benefits provided by the contributory and non-contributory plans are entirely different. The contributory plan provides health coverage, the non-contributory plan does not. The contributory plan has a cost of living adjustment. The non-contributory plan does not. The contributory plan has an unreduced early retirement benefit as early as age 55. The non-contributory plan does not. The benefit formulas for the contributory and non-contributory plans are completely different and in general, the contributory plan pays higher monthly benefits. The "career average" and minimum benefit

formulas are not used to compute benefits under the non-contributory plan. Compensation in the contributory plan includes all premium pay. In the non-contributory plan it includes only overtime and shift differential but not other forms of premium pay.

6. In short, except for having the same trustees, the two plans have nothing in common. They have different participants and different benefits. The contributory plan is a thing of the past. No new employees will be able to participate in it. The non-contributory plan is mandatory for all new employees (and for old employees who did not participate in the contributory plan). The non-contributory plan did not exist prior to January 1, 1991 and the contributory plan has been frozen after January 1, 1991. For the defendants to allege that the contributory plan has merely been amended is pure semantics. Defendants cannot avoid the proscription of ERISA by calling the creation of a new plan an amendment of the old plan.

7. Accordingly, the motion to dismiss should be denied.

8. I declare under penalty of perjury under laws of the United States of America that the foregoing is true and correct.

/s/ Stanley Jacobson
STANLEY I. JACOBSON

Sworn to before me this
day of November, 1992

/s/ [illegible]
Notary Public

EXHIBIT A

HUGHES
MISSILE SYSTEMS GROUP

May 2, 1990

Dear Fellow Employee:

The number of employee benefit choices that Hughes employees can make grew substantially during the 80's. As we move into the 90's, Hughes will be able to offer you more choices and the opportunity to design a individual benefit plan to meet your lifestyle. In the following information, you will find brief descriptions of major benefit changes taking place for salaried employees in the next to years.

Flexible Benefit Options

Hughes is developing a plan which will allow you design a benefits plan for your lifestyle. This will be done by combining the dollars spent on many of our existing benefits and letting you use these dollars to select those benefit choices which you feel are the most important. This approach has been named SPECTRUM because of the wide range options which will be offered.

SPECTRUM will make it easier for Hughes to keep care costs under control and allow you to select the type and level of coverage suited to your lifestyle. California salaried employees will have these options effective January 1, 1991.

Tucson salaried employees will not be able to participate in SPECTRUM until we move our employees onto the Corporate Payroll System. The Payroll move is currently scheduled for April 1991, with flexible benefit enrollment for Tucson employees following sometime later in 1991. More details will be provided as Tucson SPECTRUM implementation dates are finalized.

Retirement/Savings Modifications

There are several legal and accounting changes that must be made to the existing retirement plan in 1990. These changes will not result in a lower accrued retirement benefit or a change to the Magic 75 benefit, but they do make the plans more costly and difficult to administer. Due to these required changes and other issues, a new retirement plan will be introduced at Hughes effective January 1, 1991. Current employees will have a choice between the existing retirement plan and the new plan. The new retirement plan will not require employee contributions and will have benefits commensurate with a non-contributory plan.

The Company has no plan to terminate the existing retirement plan for currently participating employees. Details regarding the required changes to the Plan, as well as information to help salaried employees decide which plan to choose, will be distributed over the next few months.

There are also plans to increase the Company match in the Salaried Thrift and Savings Plan and make part of the match in GM-H stock. This change is designed to put more Company stock in the hands of employees and to make it easier for employees to increase the funds they save for the future. Details regarding this change will be announced when they have been finalized.

To Summarize

The design of many of Hughes salaried benefit plans is being changed. While some of the changes for Tucson Salaried employees will be effective January 1, 1991, others will not occur until after we move our employees onto the California payroll system.

To keep you updated on these changes, you will receive more communications in the coming months. There will also be articles in MSG Today and the Hughes news. You may want to keep copies of these communications for future reference.

Sincerely,

/s/ G.A. Monty
Gerald A. Monty
Director Human Resources

EXHIBIT B

HUGHES

INTRODUCING A NEW RETIREMENT BENEFIT . . . AND A ONE-TIME OPPORTUNITY FOR YOU

SPECTRUM

Between now and December 21, 1990, you will have a choice between electing the current contributory retirement benefit and a new noncontributory retirement benefit that is paid for entirely by Hughes.

Both have their advantages. But you must decide which one is best for you by December 21.

Item: A recent study of retirement expectations conducted by the Daniel Yankelovich Group and IDS Financial Services uncovered some surprising gaps between people's retirement goals and their confidence in their ability to meet those goals: while 97% of survey respondents said a steady source of retirement income was one of their major goals, only half said they were "doing well at achieving it."

Item: The U.S. Census Bureau forecasts that by the year 2040, the average 65-year-old will probably live another 20 years, compared with about 17 years now. That means your retirement savings will have to cover your living expenses over a longer lifetime.

Item: A Merrill Lynch survey of 45-to 64-year old nationwide found that while 59% of the respondents wanted to retire before age 65, only 18% of those people saved enough to consider retiring early.

As these news suggest, the dynamics of retirement are changing dramatically across the United States. Because of indicators like these, having adequate financial resources for retirement is more important than ever before.

Each of our retirement needs and goals is different and, as a result, each of us must take responsibility for our retirement planning and the savings that will help us achieve our goals. Your retirement program at Hughes Aircraft — made up of the Retirement Plan and the Thrift Savings Plan — can help you reach those goals.

This guide has been prepared to explain some important changes in Hughes' retirement program and to help you make some critical decisions in the coming weeks about your participation.

The decisions you make today will help make tomorrow's retirement goals a reality.

[Table of Contents Omitted]

WANT THE SHORT VERSION?

Here are the highlights of the changes in the Retirement Plan and the Thrift and Savings Plan. To learn more, please see the applicable section of this guide.

Retirement Plan:

- Hughes is adding a new noncontributory Retirement Plan alternative. Between now and December 21, you have a one-time opportunity to choose between the current contributory benefit and the new noncontributory benefit.
- If you are a current plan participant, these changes have no impact on the benefits you have already earned under the Retirement Plan.
- The *contributory benefit* continues to offer you medical coverage at retirement, an annual cost-of-living adjustment in your retirement benefit, and an unreduced early retirement benefit as early as age 55 if you qualify for Magic 75. **These three provisions are not included in the new noncontributory benefit.**
- The *noncontributory benefit* offers you the security of a retirement benefit without your having to make contributions to the plan.

Thrift and Savings Plan:

- You now have to contribute only 1% of earnings to participate in the plan and receive a matching contribution from Hughes.
- The Hughes match is improved: the first 3% of earnings saved will be matched dollar for dollar in GM-H stock. The next 4% of earnings saved will be matched at 75 cents on the dollar and will be invested the same way as your savings.

What you have to do

- Review this guide to compare your retirement benefits under the two alternatives.
- If you would like to compare personal estimates of your retirement benefits, a PC program will be available in October from your local Employee Benefits office.
- Decide which alternative is best for you and return your Retirement Benefit Election Form no later than December 21.

What if you don't make an election?

- Current plan participants (including those with suspended contributions) will automatically remain in the contributory benefit.
- Employees not currently participating in the plan will automatically receive the noncontributory benefit.

WHY THE CHANGES

In a recent study of the Retirement Plan at Hughes, the Company discovered — not surprisingly — that many employees don't consider participating in the plan until they reach their early 40s, an age at which employees traditionally start thinking about the future. But as our work force changes over the next decade and as employees' retirement goals change, planning and saving for retirement should begin earlier and occur throughout an employee's working years.

This fall, Hughes Aircraft is making several changes to the Company's retirement program.

These plan changes are being made not only to better respond to our employees' changing needs — and to those of future retirees — but also to respond to changing laws that make it increasingly difficult for companies to administer retirement plans like our current one.

Tax law changes and other legal requirements are having a significant impact on retirement plans designed 20 or 30 years ago for a very different work force. They've prompted companies like Hughes to take a closer look at their retirement programs and update these benefit plans for the 1990s — and beyond.

Hughes' commitment to a strong retirement program continues. That's why you see an increased emphasis — and higher Company match — in the Thrift and Savings Plan. The new program offers you flexibility and sound financial footing for retirement.

[sidebars omitted]

HOW TO LEARN MORE

This guide explains how Hughes has updated your retirement benefits for the 90s. Use it, together with the other materials the Company has prepared for you, in determining which Retirement Plan benefit best meets your future needs. You'll find the following materials as part of this information kit:

- A personal statement comparing benefits under the two alternatives
- A question and answer brochure
- A Retirement Benefit Election Form.

If you'd like to make a detailed analysis of your benefit alternatives. Hughes will also make available an easy-to-use computer program around October 1. Contact your local Employee Benefits office for a copy of the diskette.

Here's how the guide is organized. First, we'll take a closerlook at the Retirement Plan changes that are effective January 1, 1991. Then, we'll review the changes in the Thrift and Savings Plan. Finally, we'll look at the decisions you must make by December 21, 1990. Throughout this guide we'll offer some points you should consider as you make your decision.

A NEW OPTION FOR RETIREMENT PLANNING

Retirement benefits aren't new to Hughes employees. All eligible Hughes employees have had an opportunity to join the Retirement Plan by contributing 3% of annual compensation to the plan. At retirement, monthly benefits are provided by a combination of Company and employee contributions.

Because employees were required to contribute to participate in the plan, many employees opted out — or elected to join

the plan later in their careers when retirement became a more pressing concern.

This fall Hughes is offering all eligible employees a new retirement benefit — one that employees won't have to contribute to. The new benefit automatically covers employees hired after August 1, 1990, as well as all employees not participating in the current contributory retirement benefit on January 1, 1991. The new benefit does not replace the current contributory plan; instead, Hughes is offering current employees a one-time opportunity to choose the benefit they wish to receive.

During a special retirement enrollment period from now to December 21, 1990, you must select one of the two benefits; **once your decision is made, you cannot change your election in the future.**

COMPARING THE CONTRIBUTORY AND NONCONTRIBUTORY BENEFITS

There are several differences between the contributory and noncontributory retirement benefits that you need to understand in making your decision, including eligibility for retiree medical coverage and unreduced early retirement benefits. The chart on pages 6 and 7 compares the key differences.

WHAT RETIREE MEDICAL COVERAGE CAN MEAN TO YOU

If you elect the contributory retirement benefit, you are eligible for medical coverage from the Company when you retire. This coverage is available to you from retirement to age 65, when you are then covered by Medicare.

- Earliest age for retiree medical coverage: 55
- Age at which Medicare takes over: 65

All Hughes retirees, whether they select the contributory or noncontributory retirement benefit, will be eligible for the Medicare supplement offered by Hughes, which coordinates with Medicare to provide insurance coverage for services not fully covered by Medicare. Retirees must pay the cost of the Medicare supplement themselves.

In addition, all eligible Hughes retirees, regardless of the retirement benefit selected, receive life insurance coverage.

THE DIFFERENCES

Plan Provision	Contributory	Noncontributory
■ Employee contributions	Employee contributions of 3% of compensation required.	No employee contributions.
■ Benefit formula	You receive the highest benefit from one of three formulas (or the value of your accrued contributions, if larger). For most Hughes retirees, the final average compensation formula will provide the highest benefit: Total contributory service from eligibility date times .0175 times final average monthly compensation	Monthly retirement benefit is based on the following formula: .015 times final average monthly compensation for first 35 years of participating service plus .005 times final average monthly compensation for participating service over 35 years

minus	minus
Total contributory service from eligibility date (up to a maximum of 33⅓ years) times .015 times monthly Social Security primary insurance amount	.006 times covered compensation for first 35 years of participating service
See "Some definitions you need to know" for information on the other two formulas that may be used to calculate your benefit: ■ Career average formula ■ Minimum benefit formula	The career average and minimum benefit formulas are not used to calculate noncontributory benefits.

■ Definition of compensation for benefit calculation	Compensation used to calculate your retirement benefit includes premium pay.	Compensation used to calculate your retirement benefit includes overtime and shift differential but not other forms of premium pay.
■ Cost-of-living adjustment	■ Annual adjustment can be up or down. ■ Maximum adjustment of 4% annually, but benefit is never less than your original benefit. ■ Available only to employee who retire or leave Hughes after age 55.	No automatic cost-of-living adjustments after retirement.
■ Eligibility for retiree medical benefits	At retirement, you and your spouse are eligible for the Company's retiree medical program until age 65.	At retirement, you are not eligible for medical coverage from Hughes.

■ Vesting	The same vesting rules apply to both alternatives. Service is counted from your adjusted benefit date.	You are vested after five years of service with Hughes.
■ Unreduced early retirement benefits.	Early retirement benefits are not reduced if you retire at or after age 55 and your age and continuous service total 75 or more (Magic 75).	Early retirement benefits are not reduced if you retire three years before your Social Security retirement age with at least 10 years of continuous service. Your Social Security retirement age and eligibility for unreduced early retirement are determined as follows:

Birth year	Social Security retirement age	Earliest age for unreduced early retirement
■ Before 1938	65	62
■ 1938 to 1954	66	64
■ After 1954	67	64

Magic 75 calculation is not available.

■ Payment Options	(See "Some definitions you need to know" for more information on each option.)	
Single life annuity	Yes	Yes
Joint and survivor annuities		
—50% survivor's benefit	Yes	Yes
—66-2/3% survivor's benefit	Yes	No

—75% survivor's benefit	Yes	Yes
100% survivor's benefit	Yes	Yes
Certain and continuous options		
— for 5 years	Yes	No
— for 10 years	Yes	Yes
— for 15 years	Yes	No
Period certain options		
— for 5 years	Yes	No
— for 10 years	Yes	Yes
— for 15 years	Yes	Yes
Modified cash refund annuity	Yes	No
Social Security adjustment option	Yes	No

[sidebar omitted]

The cost to Hughes for the contributory and noncontributory benefits is approximately the same. However, since the new noncontributory benefit will not include employee contributions, this benefit will be smaller. To make up that difference, many employees who choose the noncontributory benefit may want to take the money they would have directed to the contributory benefit and invest it elsewhere — for example, in an Individual Retirement Account, the Thrift and Savings Plan, or other investments.

Which plan is best for you depends on your personal circumstances. The enclosed personal statement compares your estimated benefits under each alternative.

For additional estimates, you may want to use the computer program that will be available from your local Employee Benefits office and will enable you to estimate and compare your retirement income under both benefits. Using a personal computer, you can choose your own assumptions for salary increases, investment performance, and inflation, and estimate your benefits at different retirement ages under each alternative.

POINTS TO CONSIDER

Selecting a retirement benefit is a personal decision that only you can make. Among the points you'll want to consider are:

- Which alternative provides me the better monthly retirement income?
- Is an annual cost-of-living adjustment in my retirement benefit important to me? Or do I have other savings that I can rely on if my cost of living increases after retirement?
- Is early retirement important to me? Do I expect to be eligible for early retirement under the Magic 75 calculation?
- Is retiree medical coverage important to me? If I elect the noncontributory benefit, do I have medical coverage available through my spouse or through other sources? Do I expect to work until age 65? (Medicare coverage begins at age 65.)
- Does the benefit offer the payment options I'll want when I retire?
- Would I prefer to invest my 3% Retirement Plan contribution elsewhere — in the Thrift and Savings Plan, for example? (We'll talk more about this in the section titled "Changes in the Thrift and Savings Plan.")

WHAT THE COST-OF-LIVING ADJUSTMENT CAN MEAN TO YOU

If you elect the contributory benefit, you are eligible for an annual cost-of-living adjustment in your retirement benefit on each January 1 for as long as you or your beneficiary receive a retirement benefit from Hughes.

Here's an example of the cost-of-living adjustment for a five-year period for one Hughes retiree.

Retirement at age 65 (Year 1):	$1,000.00
Year 2 (3.5% adjustment):	$1,035.00
Year 3 (4% adjustment):	$1,076.40
Year 4 (3.7% adjustment):	$1,116.23
Year 5 (3% adjustment):	$1,149.71

IF YOU CURRENTLY CONTRIBUTE TO THE RETIREMENT PLAN

If you currently contribute to the plan, you should be aware of several rules that may apply to you:

- If you do not make an election by December 21, 1990, you will automatically continue contributing.
- If you continue participating in the contributory benefit and later suspend contributions to the plan, you may not change to the noncontributory benefit. (You may resume contributions to the contributory benefit after one year.)
- If you've participated in the contributory plan in the past, but are not currently contributing, you **must choose** a retirement benefit. If you don't, you will automatically remain in the contributory plan, but with suspended contributions.
- If you elect the noncontributory benefit and leave Hughes after age 55, the contributory benefit earned through December 31, 1990 will be eligible for the annual cost-of-living adjustment.
- If you elect the noncontributory benefit, you will not be eligible for medical coverage when you retire from Hughes.
- If you elect the noncontributory benefit and retire early from Hughes, the contributory benefit earned through December 31, 1990 will not be reduced if you qualify for Magic 75.
- If you are in your one-year waiting period and previously elected the contributory benefit, you still must decide by December 21 which retirement benefit you want.

Another important factor in making your decision may be upcoming improvements in the Thrift and Savings Plan. The next section of this guide reviews these changes.

CHANGES IN THE THRIFT AND SAVINGS PLAN

Hughes Thrift and Savings Plan is designed to help you save for long-term goals like retirement. Unlike the Retirement Plan, the savings plan allows **you** to determine — up to certain limits — how much to save and how you wish those savings invested. These options give you the opportunity to design you own retirement savings program to meet your personal needs.

Here are the plan improvements effective January 1, 1991:

- **Getting in is easier:** You now have to contribute only 1% of earnings to participate in the savings plan and qualify for a Company match. This improvement makes it even easier for all employees to participate: even if you contribute the minimum, you'll be earning a matching contribution from Hughes.

- **Improved Company match:** Hughes continues to match your savings with these improvements:

— The first 3% of earnings you save will be matched dollar for dollar in General Motors-Class H stock.

— The next 4% of earnings you save will be matched at 75 cents on the dollar.

- **Investment options:** Currently Hughes' matching contributions are invested the same way you direct your savings to be invested. Beginning January 1, 1991:

— The Hughes match on the first 3% you save will automatically be invested in GM-H stock.

— You can transfer GM-H stock to another investment after you've held it for at least two full plan years.

— The Hughes match on the next 4% you save will be invested the same way your savings are invested. (Matching contributions in your Savings Plan account through December 31, 1990 will remain invested as they currently are.)

You are eligible for all of these improved savings plan benefits regardless of which retirement benefit you select.

HOW YOU CAN BENEFIT FROM THE IMPROVED COMPANY MATCH

Here's how the improved matching contribution from Hughes compares:

NEW MATCH			OLD MATCH		
	You save	**Hughes adds**		**You save**	**Hughes adds**
	First 3%	100%		First 3%	75%
	Next 4%	75%		Next 4%	75%
	Next 5%	0%		Next 5%	0%

Here's an example of the Hughes match for an employee earning $30,000 a year and saving 7% of pay in the plan:

NEW MATCH			OLD MATCH		
	You save	**Hughes adds**		**You save**	**Hughes adds**
First 3%	$900	$900	First 3%	$900	$675
Next 4%	$1,200	$900	Next 4%	$1,200	$900
	$2,100	$1,800		$2,100	$1,575

In this example, you would receive an extra $225 a year with the new Hughes matching contribution.

[sidebar omitted]

MAKING THE MOST OF THE SAVINGS PLAN

The Thrift and Savings Plan is 401(k) plan that allows your savings, Company contributions and the earnings on these funds to accumulate tax-deferred until they are withdrawn from the plan. This means you don't pay current federal or state income taxes on your savings, the matching contributions from Hughes, or the earnings on them — a significant advantage when you're trying to save for the future.

The savings plan also allows you to establish your own investment strategy for your savings by offering you a range of investment vehicles to meet your objectives. You may continue to invest your savings in any combination of the following funds in increments of 10%:

- **Equity fund:** This fund is composed primarily of capital stock or convertible securities and the gains or losses on these investments. This fund's investment objective is long-term capital growth.
- **Fixed income Fund:** This fund is composed primarily of short-term debt obligations of not more than 12 months of the U.S. government, banks, or corporations, such as U.S. Treasury bills, certificates of deposit, commercial paper, or similar investments. This fund's investment objective is to preserve capital and earn a reasonable rate of return.
- **GM-H stock:** General Motors-Class H common stock.
- **Balanced fund:** This fund includes capital stock as defined by Standard and Poor's 500 Index Fund, obligations of the U.S. government, cash equivalents, financial futures, stock indexed futures, or similar investments. This fund's objective is to earn a reasonable rate of return in rising markets and to preserve capital, where possible, in falling markets.

POINTS TO CONSIDER

As you select your Retirement Plan benefit, you'll also want to take a close look at your Thrift and Savings Plan participation and consider how the two plans can work together to provide your future retirement security. Here are some points you'll want to consider:

- Do you currently participate in the Thrift and Savings Plan? If not, it's almost like throwing money away — because you're missing out on the Hughes match.
- If you're saving only 2% of your earnings, consider increasing your savings to take full advantage of the Company match.
- Are you currently contributing 3% of pay to the Retirement Plan? If so, are you looking for the regular monthly income provided by the Retirement Plan — or a cash lump sum that could be accumulated through the Thrift and Savings Plan?
- Is establishing a nest egg important to you — for buying a home or paying college expenses, for example? If so are you saving the maximum amount in the savings plan?

RETIREMENT SAVINGS AND YOUR TAXES

Your decision on where to make your 3% contribution to retirement savings — in the contributory retirement benefit or the Thrift and Savings Plan — carries with it some important tax implications.

Savings in the contributory benefit are made **after** federal and state income taxes are deducted from your paycheck, while savings in the savings plan are made **before** taxes. This is an important distinction that can help you save on current income taxes.

Here's a comparison of the tax savings for a single employee earing $30,000 annually when the 3% contribution is made before or after taxes.

	After-tax contributions	**Before-tax contributions**
Annual income	$30,000	$30,000
Before-tax savings	- 0	- 900
Taxable (W-2) income	$30,000	$29,100
1990 federal income tax	- 4,388	- 4,136
After-tax savings	- 900	- 0
Spendable income	$24,712	$24,964
Tax savings	$252	

This example, using 1990 tax rates, assumes the taxpayer is single with one exemption, takes the standard deduction, and has no other income, itemized deductions, or tax credits. As a California resident, this taxpayer would save an additional $84 in state taxes — for total tax savings of $336 if this 3% contribution is made before taxes in the Thrift and Savings Plan.

[sidebar omitted]

DECISIONS YOU MUST MAKE — AND BY WHEN

Your decision about your Retirement Plan participation is important — even if you don't expect to retire for another 20 or 30 years. You must complete and return the enclosed Retirement Benefit Election Form, selecting one of the two retirement benefits by December 21, 1990.

Here are the choices you need to make:

If you're currently contributing to the Retirement Plan:

- Do you want to contribute contributions?
- Do you want to switch to the noncontributory benefit?

If you're not currently participating in the Retirement Plan:

- Do you want to elect the contributory benefit or the new noncontributory benefit?

The retirement enrollment period this fall will **be your only opportunity** to make this decision. **This is an irrevocable, one-time election. Once your election is made, you cannot change your mind.**

WHAT IF YOU DON'T MAKE AN ELECTION?

If you do not return an Election Form, you will automatically be covered by a retirement benefit on the basis of your current participation:

- **Participating on December 21, 1990:**

  Automatically remain in contributory benefit.

- **Suspended contributions on December 21, 1990:**

  Automatically remain in contributory benefit.

- **Not participating on December 21, 1990:**

  Automatically participate in noncontributory benefit on January 1, 1991 (after one year of Company service).

It's important that you elect a retirement benefit; don't be assigned one just because you don't make an election. You cannot make future changes if you are automatically covered by one of these benefits.

FOR MORE INFORMATION

If you need more information about the Retirement Plan or the Thrift and Savings Plan, please contact your local Employee Benefits office.

SOME DEFINITIONS YOU NEED TO KNOW

Adjusted Benefit Date

When you are first employed with Hughes, your benefit date is the same as your hire date. If your service is interrupted, this date is moved forward, establishing your adjusted benefit date.

Annual Compensation-Contributory Benefit

Annual salary, including any amounts deferred under the Thrift and Savings Plan, plus premium pay, overtime, shift differentials, lead person bonuses, and any bonuses or amounts paid under the Salary Adjustment Plan. Supplementary Compensation Plan, or the Management Incentive Plan, and any commissions, up to a maximum of $209,200 in 1990.

Annual Compensation-Noncontributory Benefit

Annual salary, including any amounts deferred under the Thrift and Savings Plan, plus overtime, shift differentials lead person bonuses, and any bonuses or amounts paid under the Salary Adjustment Plan, supplementary compensation Plan, or the Management Incentive Plan, and any commissions, up to a maximum of $209,200 in 1990. Forms of premium pay other than overtime and shift differentials are not included.

Contributory Benefit

Benefits available from the Hughes Retirement Plan that require a 3% contribution from employees.

Cost-of-Living Adjustment

Annual adjustment in the contributory retirement benefit. The adjustment can increase or decrease your retirement benefit each year but your benefit will never be less than your original benefit. The adjustment is never more than 4%.

Covered Compensation

A 35-year average of the annual maximum Social Security wage base. It is used to calculate the noncontributory retirement benefit.

Eligibility Date

The first anniversary of your employment with Hughes provided you have worked at lease 1,000 hours in that year.

Final Average Monthly Compensation

The average of your highest monthly compensation for 60 consecutive months out of the past 120. If you have not been employed with Hughes for five years. then an average of your monthly compensation will be taken for the full period of your employment.

Magic 75

The number that qualifies you for an unreduced early retirement benefit from the contributory plan. You must be at least age 55 and your age and service with Hughes must total at least 75 to qualify.

Noncontributory Benefit

Retirement Plan benefits not requiring any contribution from employees.

Payment Options:

Single Life Annuity

Pays a monthly benefit for your lifetime only, with no benefits paid to anyone upon your death.

Joint and Survivor Annuity

Pays a monthly benefit for your lifetime and upon your death pays to your beneficiary a benefit equal to a percentage of the benefit you received.

Certain and Continuous Option

Pays a guaranteed reduced benefit until your death or, should you die within the guaranteed period, the same reduced benefit is paid to your beneficiary from the date of your death for the remainder of the guaranteed period.

Period Certain Option

Pays a benefit for guaranteed certain period to you or your beneficiary. No monthly income is payable after the guaranteed certain period.

Modified Cash Refund Annuity

Pays maximum of the monthly benefit around during the full fixed period to you only. If you die before your contributions plus interest are paid, the balance is paid to your beneficiary. No monthly benefits are payable after the fixed period. Available only from the contributory benefit.

Social Security Adjustment Option

Coordinates with Social Security to produce a total income from both the Retirement Plan and

Social Security that is approximately the same before and after your Social Security benefits begin. Available only from the contributory benefit.

Premium Pay

Pay in addition to annual compensation, including sea duty premium, hazard premium, domestic field allowances, flight pay, compensable travel pay, capture and detention pay, and foreign service premium.

Retirement Eligibility Date

Date you are first eligible to retire.

Retirement benefit formulas for the contributory benefit:

Career average formula

For compensation after December 31, 1985:

[.01 times monthly compensation up to $3,600

\+ .02 times monthly compensation over $3,600]- 12

\+ Accrued benefit through December 31, 1985

(1/24 of your contributions through 1985)

= Monthly retirement benefit

Minimum benefit formula

Total contributory service from eligibility date

x [(.005 times final average monthly compensation) + $13]

= Monthly retirement benefit

Final average compensation formula

Total contributory service from eligibility date times .0175 times final average monthly compensation

\- Total contributory service from eligibility date (up to a maximum of 33^{1} 3 year) times

0.15 times monthly Social Security primary insurance amount

= Monthly retirement benefit

Retirement benefit formula for the noncontributory benefit

.015 times final average monthly compensation

for first 35 years of participating service

\+ .005 times final average monthly compensation

for participating service over 35 years

\- .006 times monthly covered compensation for

first 35 years of participating service

= Monthly retirement benefit

This booklet presents certain highlights of the Retirement Plan and Thrift and Savings Plan at Hughes Aircraft Company. In all cases of questions or discrepancies about benefits under these plans, the plan documents and the prospectus for the applicable plan will govern. This booklet shall not be construed as a contract for purposes of employment or payment of benefits.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN RICHARD E. HOOK, ROGER BILYEU, BEATRICE A. WHYLD, DR. BERNARD WINIKUR, FRANK HENDERSON and RICHARD D. RANDALL, individually and on behalf of all those similarly situated,

Plaintiffs,

v.

HUGHES AIRCRAFT COMPANY; HUGHES NON-BARGAINING RETIREMENT PLAN; HUGHES ELECTRONICS CORP.; RAYTHEON CO.; HE HOLDINGS, INC.; HUGHES DEFENSE; HUGHES ELECTRONICS NON-BARGAINING RETIREMENT PLAN; HUGHES DEFENSE NON-BARGAINING RETIREMENT PLAN; and RAYTHEON NON-BARGAINING RETIREMENT PLAN,

Defendants.

CASE NO. CV-92-4020-ABC

FIRST AMENDED COMPLAINT

Plaintiffs, by their undersigned attorneys, complain as follows:

NATURE OF THE ACTION

1. This is a class action for breach of statutory and fiduciary duties and to enforce the rights of pension plan

participants arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001 et seq., and under the terms of the defendant Hughes Non-Bargaining Retirement Plan (the "Plan"). The plaintiffs, retired participants in the Plan, seek an order and judgment declaring that they have a vested right to all or a portion of the excess Plan assets and requiring the defendants to utilize all or a portion of such excess Plan assets to provide plaintiffs and the class they represent with improved pension benefits, together with an award of attorney's fees and the costs of the action.

2. Plaintiffs and the class they represent, during the term of their active employment with Hughes, made periodic mandatory contributions to the Plan. Over the years, as a result of these employee contributions and employer contributions and investment growth earned by the contributions, a substantial surplus accumulated in the Plan, that is, the value of the Plan assets far exceeded the pension liabilities.

3. As a result of this accumulated excess, after being acquired by the General Motors Corporation, Hughes ceased making contributions to the Plan and made no contributions from 1986 to 1991, utilizing excess Plan assets to meet its funding obligations. During the same period of time that Hughes made no contributions, participating active employees were required to continue to make contributions to the Plan, and are required to continue to do so to date. Effective January 1, 1991, Hughes created a new non-contributory plan and terminated new enrollment in the contributory Plan.

4. Plaintiffs contend that the exclusive utilization of excess pension assets by the defendants for their sole use and benefit is in violation of various provisions of ERISA and part of an unlawful plan to obtain for Hughes' own use, Plan assets belonging to and dedicated to the exclusive benefit of plaintiffs and the class they represent. Plaintiffs further contend that the Plan was terminated on January 1, 1991, entitling the

participants to an equitable distribution of the surplus assets in the form of improved benefits.

PARTIES

5. Defendant Hughes Aircraft Company ("Hughes Aircraft") is a corporation which does or did business within this judicial district and elsewhere. Defendant Hughes Electronics Corp. is the parent corporation of Hughes Aircraft. Defendant HE Holdings, Inc. ("HE Holdings") is a successor, assignee, transferee and mirror of Hughes Aircraft. Defendants Hughes Defense is a successor, assignee and transferee of all or a part of Hughes Aircraft/HE Holdings which is now in the process of merging with defendant Raytheon Co. ("Raytheon"). All the corporate defendants, and their predecessors and successors in interest, are sometimes referred to, jointly and severally, as "Hughes").

6. The Plan is an employee benefit pension plan as defined in Section 3(3) of ERISA, 29 U.S.C. § 1002(3). The Plan does business in the Central District of California and elsewhere. The Plan is or was sponsored by Hughes Aircraft which is an employer, employee benefit plan sponsor, and plan administrator within the meaning of Sections 3(5) and (16) of ERISA, 29 U.S.C. §§ 1002(5) and (16). Defendants Hughes Electronics Non-Bargaining Retirement Plan, Hughes Defense Non-Bargaining Retirement Plan and/or Raytheon Non-Bargaining Retirement Plan (the "Mirror Plans") are, or are in the process of becoming successors, assigns and/or transferees, and mirrors, of the Plan.

7. Plaintiffs Stanley I. Jacobson, Daniel P. Welsh, Robert E. McMillin, Ernest O. Blandin, Richard E. Hook, Roger Bilyeu, Beatrice A. Whyld, Dr. Bernard Winikur, Frank Henderson, and Richard D. Randall are retired employees of Hughes and are participants in and beneficiaries of the Plan as defined in Sections 3(7) and (8) of ERISA, 29 U.S.C. §§ 1002(7) and (8). Plaintiffs reside in various states and locations including within the Central District of California.

JURISDICTION AND VENUE

8. The Court has jurisdiction pursuant to Sections 409(a) and 50a) and (e) of ERISA, 29 U.S.C. §§ 1109(a) and 1132(a) and (e), and under 28 U.S.C. §§ 1331 and 1337.

9. Venue is proper pursuant to Section 502(e)(2) of ERISA, 29 U.S.C. § 1132(e)(2), because the Plan (and the Mirror Plans) is administered, the breaches took place, and the defendants reside or may be found in this District.

CLASS ACTION ALLEGATIONS

10. This action is commenced pursuant to Fed. Rules Civil Proc. Rule 23(b)(1) and (2) as a class action on behalf of a class consisting of all current and past participants in the Plan (or the Mirror Plans) who are or may become eligible to receive retirement benefits under the Plan (or the Mirror Plans.)

11. The class members are so numerous that joinder of all persons is impracticable. The class consists of over 10,000 members. There are questions of law and fact common to the class, such as (a) whether a termination of the Plan has occurred requiring the equitable distribution of surplus assets to Plan participants; and (b) whether defendants have breached their fiduciary obligations under ERISA by utilizing surplus Plan assets attributable to employee contributions for the sole and exclusive benefit of Hughes rather than for the benefit of Plan participants.

12. The claims of the proposed class representatives are typical of the claims of the class and the proposed class representatives will fairly and adequately represent the interests of the class. Each of the plaintiffs, participants in the Plan, was employed by Hughes for many years until his or her retirement, and has claims typical of those of other class members. They will request the Court to direct, pursuant to Fed. Rules Civil Proc. Rule 23(d), that Hughes serve notice by first-class mail on class members of the pendency of the action, the proposed extent of the judgment, and the opportunity of class members

to intervene or otherwise come into the action, and that Hughes file proof of such service with the Court.

MATERIAL FACTS

13. Hughes is an aerospace and electronics systems manufacturing company. It was acquired by the General Motors Corporation in 1985 and became a subsidiary of the GM Hughes Electronics Corporation which is a wholly owned subsidiary of the General Motors Corporation.

14. The Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1955, and subsequently amended from time to time. The other plan resulting from the split is the Hughes Bargaining Retirement Plan.

15. The Plan is governed and its terms are evidenced by an agreement executed by Hughes on or about January 1, 1980 and thereafter amended from time to time. The Plan is a qualified pension plan which is intended to comply with the provisions of ERISA and of Section 401 and other applicable provisions of the Internal Revenue Code.

16. Effective January 1, 1991 the Plan was terminated and replaced by a new non-contributory plan covering all non-bargaining employees employed after August 1, 1990 and all non-bargaining employees employed prior to August 1, 1990 who elected not to participate in the Plan. The termination of the contributory Plan and the terms of the new non-contributory Plan are evidenced by a document executed by Hughes on April 4, 1991.

17. The Plan provides retirement benefits to eligible retired non-bargaining (non-union) Hughes employees who participate in the Plan and to their eligible beneficiaries, including the plaintiffs.

18. Under the terms of Section 3.4 of the Plan, as a condition of admission to and continued active participation in the Plan, each participant was required to make a contribution

to the Plan. In most instances, such contributions were withheld from the participants' pay by the company during each payroll period.

19. Under the terms of Section 3.1 of the Plan, the cost of benefits under the Plan, to the extent not provided by contributions of Participants, are provided by contributions of the company not less than in such amounts and at such times as are necessary to fund benefits under the Plan.

20. Under the terms of Section 3.7 of the Plan the administrator is required to maintain a participant Contributions Account for each participant who has made contributions to the Plan.

21. Commencing in 1974 (the year ERISA was enacted) the following contributions to the Plan were made by the active participants and by the company:

Plan Year	Employee	Employer
1974	13,621,214	27,242,428
1975	15,462,525	36,338,253
1976	19,955,945	50,575,021
1977	18,086,393	49,643,953
1978	20,701,322	65,044,140
1979	22,552,274	60,609,646
1980	22,606,766	59,789,473
1981	26,088,475	82,512,517
1982	30,882,960	47,137,426
1983	36,292,781	92,571,925
1984	39,265,444	82,300,148

1985	38,718,786	24,139,676
1986	30,359,559	20,782,539
1987	44,981,446	0
1988	43,245,527	0
1989	47,317,008	0
1990	42,915,410	0
TOTAL	**513,053,835**	**698,687,145**

22. At the end of the 1990 Plan year (December 31, 1990) employee contributions since 1974 totaled $513,053,835 and employer contributions totaled $698,687,145.

23. As a result of these contributions and of investment growth of both employer and employee contributions to the Plan, a very substantial overfunding has occurred. By the end of the 1985 Plan year, assets exceeded the actuarial PVAB (present value of accrued benefits) by almost one billion ($1,000,000,000) dollars. As of December 31, 1986, the current value of assets accumulated in the Plan was $2,840,371,000 whereas the present value of accumulated benefits (vested and non-vested) was $1,732,124,000 leaving a surplus in excess of one billion ($1,000,000,000) dollars. The following shows the net Plan assets (assets available for benefits) and benefit liabilities (present value accumulated benefits, vested and non-vested) since 1986 at the beginning of each plan year:

Plan Year	Net Assets	PVAB	Excess
1986	2,421,752,000	1,448,529,000	973,223,000
1987	2,840,371,000	1,732,124,000	1,108,247,000

1988	2,993,728,000	1,833,520,000	1,160,208,000
1989	3,286,400,000	2,095,377,000	1,191,023,000
1990	3,853,602,000	2,644,837,000	1,208,765,000

24. At the time General Motors Corp. ("GM") acquired Hughes, on December 31, 1985, the Plan already had accumulated a substantial overfunding. At the same, time, the GM retirement plan was enormously underfunded, by an amount exceeding seven billion ($7,000,000,000) dollars. The GM plan was listed by the Pension Benefit Guaranty Corporation as one of the most underfunded pension plans in the country.

25. Shortly after GM acquired control, Hughes ceased making any contributions to the Plan. No Hughes contributions were made from the 1986 to the 1990 Plan year. During the same period of time Hughes continued to require employee contributions. Hughes under GM's control, in effect utilized the surplus Plan assets to meet its funding obligations even though a substantial portion of that surplus was generated by employee contributions and their earnings.

26. In 1989 Hughes amended the Plan to provide for an Operational Transition Plan (OTP) which provided significant additional retirement benefits out of Plan assets to certain eligible employees. The purpose of the OTP was to induce certain active employed Plan participants to elect early retirement so as to reduce the workforce and Hughes payroll costs. OTP benefits were made available only to participants who were active employees at the time of the adoption of the OTP amendment who met certain arbitrary requirements established by Hughes, and not to employees who retired prior to the adoption of the OTP amendment or who did not meet the arbitrary requirements.

27. In 1990, Hughes announced that effective January 1, 1991, it was creating a new non-contributory retirement plan

for non-bargaining employees and terminating future enrollment in the contributory Plan. All new salaried employees automatically became participants in the new non-contributory plan, and active employees who were participants in the contributory Plan were given the option of becoming participants in the new non-contributory plan. Active salaried employees who were not participants in the contributory Plan were given the opinion of joining the Plan or automatically becoming participants in the new non-contributory plan. Effective January 1, 1991, no new participants could be enrolled in the contributory Plan.

28. The retirement benefits provided under the new non-contributory plan are significantly less costly than the benefits provided under the contributory Plan.

29. Creation of such a new non-contributory plan meant that Hughes will not have to make any further contributions on behalf of participants of the contributory Plan as the assets of the Plan are substantially in excess of those required to fund all current and future pensions of participants of the contributory Plan.

30. Hughes will not be required to make any further contributions to fund benefits of participants of the contributory Plan but may instead improperly attempt to utilize such surplus Plan assets to fund benefits of participants in the new non-contributory plan or other plans.

AS A FIRST CLAIM FOR RELIEF
PURSUANT TO SECTION 403(c)(1) of ERISA

31. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1), provides that the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries.

32. Defendants have violated Section 403 of ERISA by utilizing excess Plan assets attributable to employer and employee contributions for the sole and exclusive benefit of the

employer and to the detriment of plaintiffs and the class they represent.

AS A SECOND CLAIM FOR RELIEF
PURSUANT TO SECTION 404 OF ERISA

33. Defendants owe plaintiffs and the class they represent the fiduciary duty pursuant to ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) and (B), to discharge their duties for the exclusive purpose of providing benefits to participants and their beneficiaries and with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

34. Defendants breached their fiduciary duty to the plaintiffs and the class they represent by utilizing excess Plan assets attributable to employer and employee participant contributions for the exclusive benefit of Hughes rather than for the benefit of Plan participants and their beneficiaries.

AS A THIRD CLAIM FOR RELIEF
PURSUANT TO ERISA § 203(a)

35. ERISA § 203(a), 29 U.S.C. § 1053(a), requires that employees be 100% vested in their own contributions to a pension plan that "an employee's rights in his accrued benefit derived from his own contributions are non-forfeitable."

36. Defendants violated ERISA § 203(a) by using assets attributable to employees' own contributions to meet defendants' funding obligations and have therefore caused a divestiture and forfeiture of rights.

AS A FOURTH CLAIM FOR RELIEF
PURSUANT TO ERISA § 4404

37. ERISA § 4404, 29 U.S.C. § 1344, provides for the distribution of excess plan assets attributable to employer and employee contributions in the event that a plan is terminated.

38. ERISA § 4404(d)(3), 29 U.S.C. § 1344(d)(3), provides that all residual assets attributable to employee contributions must be distributed to employees.

39. ERISA § 4404(d)(1), 29 U.S.C. § 1344(d)(1)), provides that the employer may revert excess assets to itself only if:

(a) All liabilities of the plan have been satisfied;

(b) The distribution does not contravene any provision of law; and

(c) The plan provides for such reversion.

40. ERISA §§ 4404(d)(2)(A) and (B), 29 U.S.C. §§ 1344(d)(2)(A) and (B) (the "Pension Protection Act"), provides that any amendment to the plan which permits reversion of surplus assets to the employer upon termination of the plan or increases the amount of the reversion shall not be effective until five years after the amendment was adopted (unless the plan is less than 5 years old in which case if the plan always had the reversion provision it is effective).

41. Under the provisions of ERISA § 4044(d)(3)(A), 29 U.S.C. § 1344(d)(3)(A), before any surplus plan assets can be distributed to the employer any surplus assets attributable to employee contributions must first be "equitably distributed" to the employees who made the contributions or to their beneficiaries.

42. By creating a new non-contributory plan for all salaried employees employed on or after January 1, 1991 and for all salaried employees employed prior to January 1, 1991 who did not elect to participate in the Plan, effective January 1, 1991, Hughes terminated the Plan within the meaning of ERISA § 4404, 29 U.S.C. § 1344, and as such is required to follow procedures established by ERISA § 4404, 29 U.S.C. § 1344, including distribution of excess assets attributable to employee contribution to the Plan participants in accordance with the statute.

43. The Plan does not contain any provision for reversion of excess assets to the employer upon termination and therefore all excess assets attributable to employer contributions must also be distributed to the participants.

AS A FIFTH CLAIM FOR RELIEF
PURSUANT TO §§ 403-05 OF ERISA

44. ERISA §§ 403, 404, and 405, 29 U.S.C. §§ 1103, 1104, and 1105, impose certain fiduciary duties upon plan fiduciaries.

45. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1), requires that plan assets "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

46. ERISA § 404(1)(A), 29 U.S.C. § 1104(1)(A), provides that plan fiduciaries shall expend fund assets for the exclusive purpose of "providing benefits to participant and their beneficiaries" and for "defraying reasonable expenses of administering the plan."

47. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), prohibits plan fiduciaries from causing the plan to engage in a transaction constituting a direct or indirect "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan."

48. Section 6.5(b) of the Plan provides that no amendment shall be made at any time under which any part of the Plan may be diverted to purposes other than for the exclusive benefit of the participants and their beneficiaries.

49. Hughes intends to divert assets of the Plan to pay benefits to participants of the new non-contributory plan or others who are not participants in the Plan.

50. Paying benefits from assets of the Plan to persons who are not participants of the Plan would violate ERISA §§ 403 and 404, 29 U.S.C. §§ 1103 and 1104, and Section 6.5(d) of the Plan which prohibits using Plan assets for anyone other than Plan participants and their beneficiaries.

51. Paying benefits from assets of the Plan to participants of the new non-contributory plan constitutes an unlawful transfer of assets from the Plan to the new plan for the benefit of Hughes, a party in interest as defined in ERISA § 3(14), 29 U.S.C. § 1002(14), which, under the terms of the new non-contributory plan, is required to fund all such benefits. Such a transfer of assets is prohibited by ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

AS A SIXTH CLAIM FOR RELIEF
PURSUANT TO ARTICLE V §5.2 OF THE PLAN

52. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), provides that the plan fiduciaries shall carry out their duties "in accordance with the documents and instruments governing the plan."

53. ERISA § 502(a)(1)(B) provides, in part, that a plan participant or beneficiary may bring an action to "enforce his rights under the terms of the plan."

54. Article V§5.2 of the Plan provides in relevant part that the "Plan shall be administered, interpreted and applied fairly and equitably and in accordance with the specified purpose of the Plan."

55. Hughes provided OTP benefits out of the Plan assets in a discriminatory manner by making such benefits available only to certain participants who were active employees of Hughes at the time of the adoption of the OTP amendment and not to existing retirees and certain other Plan participants. By providing OTP benefits in such a discriminatory manner, Hughes breached the terms of Article V § 5.2 of the Plan and of ERISA.

RELIEF

56. Wherefore plaintiffs request a judgment against the defendants:

(a) Equitably distributing all excess Plan assets attributable to employee contributions to the Plan participants in the form of improved benefits;

(b) Equitably distributing all excess Plan assets to Plan participants in the form of improved benefits;

(c) Enjoining the defendants from using or diverting any assets of the Plan for the purposes of paying benefits under or administering the new non-contributory plan or any other plan;

(d) Appointing a neutral trustee to administer the Plan in accordance with the provisions of ERISA and the judgment of this Court;

(e) Ordering the defendants to restore to the Plan all Plan assets used to pay OTP benefits and/or pension benefits to persons who are not participants of the contributory Plan;

(f) Awarding plaintiffs reasonable attorneys fees, cost and disbursements incurred in connection with the prosecution of this action;

(g) Granting such other and further relief as the Court deems equitable, just and proper.

SERVICE REQUIRED BY ERISA

57. A copy of this First Amended Complaint shall be served on the Secretary of Labor and Secretary of the Treasury pursuant to Section 502(h) of ERISA, 29 U.S.C. § 1132(h).

DEMAND FOR JURY TRIAL

58. Plaintiffs demand a trial by jury.

DATED: December 12, 1997

SETH KUPFERBERG,
A Member of SIPSER,
WEINSTOCK, HARPER &
DORN, L.L.P.

JULIUS MEL REICH,
A Member of REICH,
ADELL, CROST & CVITAN
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/s/ Julius Mel Reich
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(14)

No. 97-1287

In The

Supreme Court of the United States

October Term, 1997

HUGHES AIRCRAFT COMPANY and HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

vs.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. McMILLIN, ERNEST O. BLANDIN and RICHARD E. HOOK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit correctly found numerous material differences between this case and *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), including, among others, that this complaint involves: a) plan assets derived from employee contributions; b) payment from the assets of a plan to nonparticipants to whom the plan sponsor owes a separate debt; c) breach of ERISA's trust, anti-inurement, prohibited transaction, termination, and nonforfeiture provisions; and d) a sham transaction contrived to conceal departure from the law.

2. Whether the Ninth Circuit correctly found that ERISA requires that plan assets be held in trust for the exclusive benefit of plan participants, that it grants heightened protection to assets derived from employee contributions, and that these requirements can be enforced under ERISA §§ 409 and 502.

3 Whether the Ninth Circuit correctly found that ERISA's nonforfeiture provision can entitle participants in a contributory plan to amounts whose value exceeds that of defined benefits.

4. Whether the Ninth Circuit correctly found that an employer can be ordered to use the means for plan termination established by ERISA's Title IV.

PARTIES TO THE PROCEEDING

As stated in the petition for writ of certiorari,

> "Hughes Aircraft Company... recently merged with Raytheon Company. Following that merger, two corporations and two pension plans have an interest in this case: Hughes Electronics Corporation, Raytheon Company, Hughes Non-Bargaining Retirement Plan, and Raytheon Non-Bargaining Retirement Plan. All four of these entities were recently named as defendants in an amended complaint." Pet. iii.

Petitioners' Brief correctly states that Hughes Electronics Corp. and Raytheon Co. ("Raytheon") are defendants named in the amended complaint. Pet. Brf. iii. The amended complaint also names the two companies' pension plans as defendants.

In addition, the amended complaint adds five plaintiffs -- Roger Bilyeu, Beatrice A. Whyld, Dr. Bernard Winikur, Frank Henderson and Richard D. Randall -- who reside in the Central District of California to which venue was transferred, on defendants' motion, after the filing of the original complaint in the U.S. District Court for the District of Arizona. Pet. App. 4a.

Plaintiffs' motion for certification as class representatives is pending before Judge Audrey B. Collins (Judge Richard A. Gadbois Jr., the original judge in the case, having died during the pendency of plaintiffs' appeal).

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MISCELLANEOUS

INTRODUCTION

Petitioners characterize this case as "about respondents' quest for a 'pot of gold.'" Pet. Brf. 1. They fail to mention that the pot was filled by employees out of their after-tax salaries. The respondent plaintiffs are participants in Hughes' contributory pension plan which when Hughes froze participation in 1990 -- after four years in which only employees, *not* the employer, contributed (J.A. 24) -- possessed a surplus (assets that exceeded the present value of accrued benefits) of $1.2 billion. J.A. 25.[1]

The Complaint alleges that Hughes is using this surplus, much of which derives from employee contributions, to pay Hughes' separate obligations to employees who are not Contributory Plan participants. Such use of plan assets for a non-plan corporate debt breaches the Employee Retirement Income Security Act of 1974 ("ERISA"). The Complaint also alleges that by barring new participants from the Contributory Plan, Hughes capped its liabilities and insured that not all assets would be used for Contributory Plan participants, requiring Hughes to use the plan termination procedures established by ERISA.

Petitioners seek to obscure the facts of the case, especially that Hughes is diverting assets from one plan to another. They repeatedly argue that Hughes is free to use "plan assets to fund new or different benefits *for plan participants*" (emphasis supplied). Pet. Brf. 2, 10, 22. Yet the Complaint alleges that the different benefits here are *not* for Plan participants, but for other employees to whom Hughes made a separate promise. Petitioners' premise that there is just one plan raises, as the Ninth Circuit found, a factual question that cannot be decided on a motion to dismiss.

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[1] Forms 5500 filed by Hughes with the Department of Labor show the same pattern since the complaint. Employees, but not the employer, contributed to the plan, whose reported surplus was over $2 billion as of November 1996.

Their legal premise, that a defined benefit plan only owes participants the defined benefit, is also wrong. ERISA also requires that plan assets, especially those attributable to employee contributions, be held in trust and never inure to or be used for employers' benefit. An employee benefit plan under ERISA is not a profit-making insurance company whose obligation is limited to paying promised benefits, but a trust for beneficiaries of the trust. Only on the disputed factual premise that there is just one plan and by ignoring express provisions of ERISA can petitioners read *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), to support them.

STATEMENT OF THE CASE

A. The Hughes Plans

1. The Contributory Plan

From 1951 to 1979, Hughes Aircraft Co. ("Hughes") sponsored the Hughes Retirement Plan. On January 1, 1980 this plan was split into two: the Hughes Bargaining Retirement Plan for unionized employees, and the Hughes Non-Bargaining Retirement Plan (the "Contributory Plan" or "Plan"). J.A. 22, 61, 179. The Contributory Plan has at least 10,000 participants (J.A. 21) -- according to Hughes, 60,000 (J.A. 174).

Section 1.39 of the Contributory Plan as restated in 1985 defines its "participants." As defined, they include employees not covered by a union contract who agree to the Plan's provisions "to the extent consistent with applicable law," and to contribute to the Plan a portion (until 1986 4%, thereafter 3%) of their compensation, which is withheld from their pay. Exhibit 1 to March 12, 1992 Declaration of Ann L. Verhey in Support of

Defendants' Motion to Dismiss.[2] Hughes was the Contributory Plan's administrator as well as its sponsor. J.A. 21, 64, 100. The Plan called for Hughes to fund benefits "to the extent not provided by contributions of Participants." J.A. 23, 70.

From 1974, when ERISA was enacted, through 1990, employee and employer contributions to the Contributory Plan totaled $1.2 billion, of which $513 million came from the employees. J.A. 23-24. In 1986 Hughes was acquired by General Motors Corporation ("GM"), whose own retirement plan was enormously underfunded. From 1987 through 1990 there were *no* employer contributions to the Contributory Plan; employees contributed $178 million. J.A. 24-25. At the beginning of 1987, assets exceeded the present value of accrued benefits (both non-vested and vested) by $1.1 billion. J.A. 25. Even with *only* employees contributing, this figure grew thereafter, to $1.2 billion at the end of 1989. *Id.*[3]

In May 1990 Hughes announced that

> "a new retirement plan will be introduced at Hughes effective January 1, 1991. Current employees will have a choice between the existing retirement plan and the new plan. The new retirement plan will not require employee contributions and will have benefits commensurate with a non-contributory plan.

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[2] Although excerpts from this document are in the Joint Appendix (J.A. 37-104), Section 1.39 was inadvertently omitted. The Joint Appendix includes key sections referred to in 1.39, notably 2.1 (J.A. 68-9) and 3.4 (J.A. 47, 71). Since other sections referred to in 1.39 are not included, for convenience the Plan's complete Articles I (including 1.39) and II are attached as an appendix to this Brief pursuant to this Court's Rule 24.3.

[3] As previously noted, the figure later grew to over $2 billion.

"The Company has no plan to terminate the existing retirement plan for currently participating employees." J.A. 198.

Hughes announced that while current employees could stay in the Contributory Plan, no one hired after July 1990 could join. Current employees not already in the Contributory Plan would have a "one-time opportunity" to join before December 21, 1990, after which it would admit no new participants. J.A. 208, 226.

2. The Contributory Plan and Hughes' New Retirement Plan

Effective January 1, 1991, Hughes executed a document referred to below as the "1991 Restatement." J.A. 105. Although purportedly a restatement of the Contributory Plan, the 1991 Restatement describes *both* that Plan, and the noncontributory "new retirement plan" announced by Hughes the previous spring.

The two plans, which Hughes named "benefit structures," are described in the 1991 Restatement's Exhibits A and B. Exhibits A and B state, respectively, "additional terms of the Plan that apply to Participants in the contributory benefit structure" and "in the non-contributory benefit structure." J.A. 125, 159. "Additional terms" is deceptive: as summarized below, they include virtually all provisions that make up a plan, including rules for participation, accruals, benefits, and funding. Terms not in the Exhibits, but applicable to both plans, are limited to such matters as naming Hughes as the plan administrator. J.A. 106.

The old Contributory Plan described in Exhibit A of the 1991 Restatement, and the new noncontributory plan described in Exhibit B, have totally different participants. Section 1.45 of the 1991 Restatement defines "participant" as "any person included in the Plan as provided in Article II." Article II simply refers to "the Applicable Exhibit." Exhibit 2 to March 12, 1992 Declaration of

Ann L. Verhey in Support of Defendants' Motion to Dismiss; J.A. 108. Exhibit A retains the Contributory Plan's old participation provision except that employees hired after July 1990 or who did not join by December 21, 1990 are barred. J.A. 131-2. Exhibit B, by contrast, defines as participants all non-union employees *except* participants in the Contributory Plan. J.A. 162-3. This is not a matter of one plan offering options. While participants in the Contributory Plan can switch out (though almost none have, J.A. 34), no one can join the Contributory Plan after December 1990.

Other differences between the plans are stark. The new plan has far inferior benefits. According to Hughes, only "2% of the employee participants participating in the contributory benefits structure elected to change." J.A. 34. The benefits described in Exhibits A and B (J.A. 109, 125-172) had been contrasted by Hughes itself when announcing its "new retirement plan." J.A. 198, 208-215. Major differences include:

Beneficiaries	**<u>Contributory Plan</u>**	**<u>"New Retirement Plan"</u>**
eligibility (J.A. 208, 226)	non-bargaining employees hired by August 1, 1990 who elected participation by December 21, 1990	all other non-bargaining employees
participation (*Id.*)	voluntary	automatic

Benefits normal pension formula (J.A. 210-211, 229)	based on years of service times .0175 times monthly average "compensation" over best-paid five years of service	based on .015 times average monthly "compensation" over 35 years of service
"compensation" on which pension is based includes all premium pay (J.A. 212)	yes	no
alternative benefit formulas used if they result in a higher pension (J.A. 210-211)	yes	no
unreduced early retirement benefit available (J.A. 213-214)	at age 55, if age and years of service total 75	at age 62, with 10 years of continuous service
COLA paid to retirees (J.A. 212)	yes	no
health benefits for retirees and dependents under age 65 (J.A. 212)	yes	no

Funding and Payment of Benefits employee contribution required (J.A. 210)	3% of compensation	none
certain and continuous annuity options available (J.A. 215, 230)	5, 10 or 15 years	10 years
social security adjustment option available (J.A. 215, 230-231)	yes	no
modified cash refund annuity available (J.A. 215, 230)	yes	no

In short, Exhibit A (the Contributory Plan) and Exhibit B (the "new retirement plan") are stapled to the same document and name the same administrator. They have almost nothing else in common.

Hughes' May 1990 announcement said the new retirement plan would be "paid for entirely by Hughes." J.A. 201. The 1991 Restatement, however, provides for funding of the new plan not "entirely by Hughes," but entirely from Contributory Plan assets. This plainly benefited Hughes, just as if the Contributory Plan had paid Hughes' wage, debt service or electric bills. The 1991 Restatement calls for Hughes to fund benefits "to the extent not provided by contributions of Participants if required under the Applicable Exhibit." J.A. 108. By making Contributory Plan assets available for benefits under *both* exhibits, the 1991

Restatement diverted Contributory Plan assets, largely from employee payments (Hughes had not contributed at all since 1986), to meet Hughes' obligation to the noncontributory plan.

Besides creating the "new retirement plan" announced earlier by Hughes but funding it (contrary to the announcement) out of Contributory Plan surplus, the 1991 Restatement made two significant changes in the Contributory Plan. First, it allowed Hughes to recoup surplus assets in case of plan termination, a new provision. J.A. 97-9, 118-9. Second, as already discussed, it limited participation in the Contributory Plan to employees who joined before December 21, 1990. J.A. 131-2. By closing participation in the Contributory Plan, Hughes put a ceiling on that Plan's liabilities. No new participants, only current ones, could accrue benefits. Future accruals, while significant, became actuarially predictable. Ongoing accruals also continued to require ongoing employee contributions.

Plaintiffs allege that the Contributory Plan's surplus sufficed to make it actuarially certain, once new participants were barred, that Hughes would continue to pay nothing to the Contributory Plan. Furthermore, even without employer payments, the Contributory Plan's surplus would grow forever.[4] Contributory Plan assets were "substantially in excess of those required to fund all current and future pensions of participants," and no new participants could join. J.A. 26. The surplus, largely from employee payments, would finance the new noncontributory plan which Hughes had announced would be "paid for entirely by Hughes." J.A. 201.

B. The Complaint

The Complaint, filed by five plaintiffs seeking to represent "all participants of the Plan who are or may become eligible to

[4] As noted, Forms 5500 confirm that this has been true so far.

receive retirement benefits under the Plan," alleged six causes of action under 29 U.S.C. §§ 1109 and § 1132. J.A. 19-32.[5] First, plaintiffs alleged breach of 29 U.S.C. § 1103. J.A. 27. § 1103 requires that "all assets of an employee benefit plan shall be held in trust," adding, in § 1103(c):

> "(1) Except...under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of title 26 as in effect on January 1, 1995, the assets of a plan shall never inure to the benefit of any employer."

Second, plaintiffs alleged breach of 29 U.S.C. § 1104(a)(1), which requires fiduciaries to act "solely in the interest of the participants." Third, they alleged breach of 29 U.S.C. § 1053, which makes "an employee's rights in his accrued benefit derived from his own contributions... nonforfeitable." J.A. 27-8.

Fourth, plaintiffs alleged breach of 29 U.S.C. § 1344, part of ERISA's Title IV. J.A. 28-9. Title IV sets the "exclusive means," 29 U.S.C. § 1341(a)(1), for pension plan termination. For a plan with assets sufficient to meet liabilities, these include notice from the plan administrator to affected parties including the Pension Benefit Guaranty Corporation ("PBGC"), and can conclude with the employer's receipt of surplus assets only pursuant to § 1344(d). That section allows employers to recoup surplus derived from their own payments if a plan provision permitting recoupment has been in effect for at least five years. Surplus attributable to employee payments must "be equitably

[5] § 1109(a) makes plan fiduciaries which breach a duty to a plan "liable to make good... any losses to the plan... , and to restore to such plan any profits... made through use of assets of the plan." It permits "other equitable or remedial relief." § 1132(a) lets plan participants sue to enjoin violations of ERISA or for "other appropriate equitable relief" to enforce the statute.

distributed to the participants who made such contributions," under § 1344(d)(3). The statute, that is, requires that employee contributors to a pension trust be given the remainder as well as the beneficial interest in this part of its assets. § 1103, already quoted, makes employer recoupment of assets an express exception to its anti-inurement rule. The Internal Revenue Code's ("Code's") § 4980 requires employers to pay a special tax on recouped assets.

Plaintiffs alleged that by closing participation in the Contributory Plan and thereby creating an actuarial certainty that a large share of its assets would never be used to pay benefits to Contributory Plan participants, Hughes rendered the Contributory Plan what at common law can be called a "wasting," "dry" or "resulting" trust. These terms mean, basically, that if a trust's assets will not be used for their intended purpose, the trust should be terminated and its assets equitably distributed. For a pension trust, Title IV specifies the means of termination including how assets are allotted. Having rendered the Plan a wasting trust, plaintiffs argued, Hughes must use the prescribed means for plan termination and ultimately distribute surplus under § 1344 -- instead of using assets of the wasting trust to meet Hughes' separate obligations under the new noncontributory plan.

Fifth, plaintiffs alleged a breach of 29 U.S.C.§ 1106(a)(1), which forbids a fiduciary to cause a plan to engage in a transaction which the fiduciary "knows or should know... constitutes a direct or indirect ... use by or for the benefit of a party in interest of any assets of the plan." J.A. 29-30. They alleged that by using Contributory Plan assets to pay its separate debt to the noncontributory plan, Hughes breached §§ 1104 and 1106.

The sixth and last cause of action involved facts different from the others. In 1989, Hughes created an early-retirement program which used Contributory Plan assets to induce some employees to retire. J.A. 25-6, 42-5. Plaintiffs alleged that in

using Plan assets for this purpose, rather than for the participants, Hughes breached § 1104. J.A. 30-1.

C. District Court Proceedings

Before any discovery, Judge. Gadbois dismissed the complaint without leave to amend. Pet. App. 4a, 53a-63a. He held that in a defined benefit plan "No participant has a right to the surplus assets, but instead is entitled to the defined benefit" (Pet. App. 56a); that "upon the face of Plan documents" the contributory and noncontributory "benefits structures" are not two distinct plans (Pet. App. 58a); and that "As the allegations are insufficient to establish that a new plan has been created, Plan assets cannot have been unlawfully diverted" (Pet. App. 60a). He called "wasting trust analysis... not applicable." Pet. App. 59a.

D. Ninth Circuit Proceedings

The Ninth Circuit reversed. Pet. App. 1a-27a. It summarized the claim that Hughes was diverting Contributory Plan surplus to the new noncontributory plan, and said that to accept Hughes' denial at the pleading stage would "disregard plaintiffs' allegations... that two separate pension plans exist." Pet. App. 3a-4a, 16a. Besides the question if there was one plan or two, the court saw another issue requiring factual development: whether closing enrollment in the Contributory Plan made it a wasting trust which must be terminated. To decide that, the court said, required evidence of whether the "Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan." Pet. App. 11a and n. 3, 22a-23a.

The panel noted numerous differences from *Lockheed*, including that there: a) the plan was solely employer-funded, b) an amendment enhanced benefits for plan participants, and c) no one claimed Lockheed had made its plan a wasting trust or devised a sham transaction to cloak the unlawful transfer of assets to another

plan. Pet. 7a-8a, 25a. Judge Norris, dissenting, called the "contributory/non-contributory dichotomy... the heart of the majority's analysis," and said that "[i]n terms of economic reality" the distinction "should make no difference." Pet. App. 37a. Like Judge Gadbois, he argued that participants in a defined benefit plan are entitled to *only* defined benefits and that "The 1991 amendment did not create a separate pension plan." Pet. App. 48a, 30a-31a. He also endorsed a suggestion that since "[i]n bad times (when declines in the value of assets make plans underfunded) employers must contribute more," it would be "asymmetric" not to let them profit from plan surpluses. Pet. App. 29a-30a, quoting *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1190 (7th Cir. 1994)..

SUMMARY OF ARGUMENT

1. In substance, what Hughes did in this case was to create a new, separate plan for non-participants in the Contributory Plan, then dip into the Contributory Plan's coffers to meet this unrelated debt. To insure the availability of the entire Contributory Plan surplus, Hughes capped that Plan's liabilities by barring new participants, which insured that not all Contributory Plan assets would be used for Contributory Plan participants. Having done this, Hughes should have used Title IV means to terminate the Contributory Plan, but did not do so because it did not want to distribute surplus to employees nor to pay tax. By *not* using Title IV means to terminate the Contributory Plan, Hughes, in substance, illegally took for its own use that Plan's entire surplus.

Hughes' diversion of Contributory Plan assets to pay a separate corporate debt was forbidden by 29 U.S.C. §§ 1103, 1104 and 1106. To conceal the substance of its actions, Hughes mislabeled the Contributory Plan and new noncontributory plan two "benefit structures" of one plan. The 1991 Restatement was a sham transaction that disguised two plans as one.

Whether the Contributory Plan and the noncontributory plan to which the older Plan's assets are being diverted are distinct plans as plaintiffs allege cannot be decided on a motion to dismiss. Precedent dating at least to *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), shows the criteria for judging when a "plan" exists: ascertainment of the benefits provided, beneficiaries, source of funding, and procedure for paying benefits. Whether a plan exists in light of these criteria has repeatedly been found a factual question. Using these criteria, the Contributory Plan and new retirement plan are plainly distinct enough so that a claim that there are two plans cannot be dismissed.

Petitioners stress that defined benefits are being paid. The independent force of §§ 1103, 1104 and 1106, especially for assets from employee contributions, is clear from ERISA's text, structure and legislative history. Had Congress only wished to require that defined benefits be paid, there would have been no reason for § 1103. Plans could have been regulated like banks and insurance companies which are required to keep promises but do not hold all assets in trust. Far from doing that, ERISA expressly differentiates plans from insurance companies.

That plan amendments are not generally fiduciary acts is also no basis to dismiss this complaint. § 1103's reach is not limited to fiduciary acts. As for §§ 1104 and 1106, *Lockheed* makes clear that implementing an amendment may be a fiduciary act even when adopting the amendment is not. Sham transactions are not sanitized by calling them "amendments."

2. Plaintiffs seek an order compelling Hughes to use the means for plan termination of Title IV, ending with distribution of surplus under § 1344. The issue for this Court is whether an employer can be compelled to use Title IV procedures. Whether the district court should do so in this case depends on factual questions not yet developed.

Petitioners admit that courts can enforce a contract by ordering plan termination. In doing so, courts apply common-law contract principles, and have the same power when applying trust principles. By closing participation in the Contributory Plan, Hughes created an actuarial certainty that a large part of its assets, including those from employee payments, would never be used for the Contributory Plan's beneficiaries. Common-law courts in such situations ordered trusts terminated and their assets equitably distributed. For a pension trust, Title IV and its § 1344 establish the means of termination and how assets are equitably allotted. A court can order those means to be used.

3. Since Hughes threatens rights made nonforfeitable by § 1053, the claim under that section cannot be dismissed.

ARGUMENT

I. THE COMPLAINT STATES A VALID CLAIM UNDER ERISA'S TRUST, ANTI-INUREMENT, FIDUCIARY AND PROHIBITED TRANSACTION PROVISIONS.

A. The 1991 restatement was a sham designed to evade ERISA.

In substance, what Hughes did in this case was to create a new pension plan for non-participants in the Contributory Plan -- announced as a "new retirement plan... paid for entirely by Hughes" (J.A. 198, 201) -- , then dip into the Contributory Plan's coffers to meet this separate corporate debt. Doing this saved Hughes hundreds of millions or even billions of dollars which it would otherwise have had to pay to keep its promise to participants in the noncontributory plan. Instead, payment is coming from assets of the Contributory Plan, including those attributable to employee contributions.

To insure the availability of the *entire* Contributory Plan surplus (some of which might otherwise have been needed for benefits to new Contributory Plan participants), Hughes capped that Plan's potential liabilities by barring new participants. The Contributory Plan's assets are so large that to an actuarial certainty, they will never be used for benefits to current Contributory Plan participants, and no new participants can join. If not (improperly) diverted to other uses by Hughes, the assets would simply grow forever. The Contributory Plan has been rendered a "wasting trust," one not being used for its intended purpose.

What Hughes should have done, once the Contributory Plan became a wasting trust as a result of the bar on new participation, was to terminate that Plan through the means described in Title IV. Had Hughes done so, however, it would have had to distribute surplus to employees under § 1344, and pay a tax under the Code's § 4980 on any funds which Hughes recouped. This would have eliminated most or all of the profit Hughes sought by using Contributory Plan assets to meet Hughes' separate debt. By *not* using Title IV means to terminate the Contributory Plan, Hughes, in substance, illegally recouped for its own use the entire surplus.[6]

Hughes' diversion of Contributory Plan assets to pay a separate corporate debt was forbidden by §§ 1103, 1104, and 1106. § 1103 has an exception for assets that revert to the employer on plan termination, but reversion is impermissible for assets attributable to employee contributions. It is a *per se* breach of § 1106 for a fiduciary to use a plan's assets for the employer rather than the plan's participants.

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[6] **While the case was pending, Hughes' shareholders even more directly profited from surplus assets of the Contributory Plan. As previously stated, Hughes merged with Raytheon. The "sales price" for the merger surely reflected that Hughes was paying its debt to the noncontributory plan with the Contributory Plan's money.**

Had Hughes openly announced that the administrator of the Contributory Plan would use its assets to meet Hughes' debt by paying the noncontributory plan money owed by Hughes, courts would have had no difficulty finding a breach of ERISA. The administrator of the Contributory Plan would clearly have violated §§ 1103, 1104 and 1106.[7] Similarly, had Hughes announced that it was terminating the Contributory Plan but did not wish to distribute surplus to employees nor to pay tax on what Hughes recouped, the PBGC and Internal Revenue Service would have had no difficulty finding a breach of § 1344 and the Code's § 4980.

Hughes sought to conceal the substance of its actions by naming the Contributory Plan and noncontribory plan two "benefit structures" of a single plan. By stapling both to one document, which it styled an "amendment" of the Contributory Plan, Hughes sought to immunize its actions from review. In short, the 1991 Restatement was a sham transaction which disguised two plans as one to try to hide the transfer of assets from one plan to the other.

In *Lockheed*, this Court held that it was not a fiduciary act for the plan sponsor to adopt a lawful amendment improving benefits for some participants in a noncontributory pension plan,

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[7] As *Lockheed* recently explained, § 1106 bars

> "commercial bargains that present a special risk of plan underfunding because they are struck with plan insiders, presumably not at arms-length.... [:] uses of plan assets that are potentially harmful to the plan." 517 U.S. at 893.

Subject to exemption under § 1108, such transactions are prohibited generally, even if in a specific case there is no harm. See *Commissioner v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993). Regardless whether the Contributory Plan's ability to pay benefits was threatened by diversion of assets to the noncontributory plan, it is obvious that in general, to have a plan pay its sponsor's unrelated debts risks plan underfunding.

and that it was not a breach of fiduciary duty for those administering the plan to implement the amendment by paying benefits. The Court observed that nonfiduciary provisions of ERISA (such as § 1103) do govern plan amendments, 517 U.S. at 891, and that paying benefits in a "sham transaction, meant to disguise an otherwise unlawful transfer of assets," might indeed be a fiduciary breach, *Id.* at 895 n. 8.[8] Hughes' scheme, described above, is a perfect example of such a "sham transaction." In implementing it, Hughes as administrator of the Contributory Plan breached its fiduciary duty.

Petitioners, to repeat, seek to obscure the facts alleged. The Ninth Circuit did *not* hold that Hughes "unwittingly" or "accidentally" created a new plan. Pet. Brf. 28, 34. The actions challenged bear no resemblance to plan amendments which according to the ERISA Industry Committee, are "routinely... adopted to alter, and typically to improve, plan benefits for participants." ERISA Industry Committee Brf. 17. Rather, Hughes schemed to evade ERISA's prohibition on using Contributory Plan assets to meet Hughes' debt to the separate plan which had been trumpeted by Hughes itself as a "new retirement plan... paid for entirely by Hughes." J.A. 198, 201. The 1991 Restatement was a sham, describing as one plan what was really two.

B. Whether there is one plan or two is a factual question.

§§ 1103, 1104 and 1106 require a plan's assets to be held in trust for the sole benefit of participants. Using trust assets to pay the employer's separate obligations under a different plan is a clear

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[8] The opinion also described a "sham transaction" as "cover for an illegal scheme." This Court has often used the word "sham" with that connotation. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

breach of ERISA's trust, anti-inurement and prohibited-use provisions. To find otherwise would sanction robbing Peter to pay Paul.[9]

This has been clear at least since *Cutaiar v. Marshall*, 590 F.2d 523, 528-30 (3d Cir. 1979), and *Donovan v. Mazzola*, 716 F.2d 1226, 1238 (9th Cir. 1983), found it violated § 1106 for one plan to deal with another that did not have identical participants.[10] The Department of Labor, as well as the court, saw a per se violation "[i]f there is a single member who participates in only one of the plans." *Cutaiar, supra. Cf. Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571 n. 12 (1985) (trustee attempt "to expand plan coverage beyond the class defined in the plan's terms" would breach § 1104).

That the diversion of assets to a different plan breaches § 1103 is evident from the insertion in § 1103(c) of an exception "under section 420 of title 26." § 420 lets pension plans transfer assets to a special account used to pay the employer's debt to retirees for health benefits. Such benefits must be paid promptly, with unused amounts returned at year's end to the pension plan. Payment can be made only to retirees already entitled to benefits under the pension plan as well as to health benefits; other limits include a requirement that employers not reduce the health benefits provided for five years. § 420(c)(1)(B), (c)(3) and (e)(1)(C). Even

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[9] "To rob Peter and pay Paul is said to have derived its origin when, in the reign of Edward VI, the lands of St. Peter at Westminster were appropriated to raise money for the repair of St. Paul's in London." John Heywood, *Proverbes* (1546).

[10] In *Cutaiar*, a union pension fund lent money to a union welfare fund; there was "no hint of self-dealing, no trace of bad faith. .. [T]he terms of the transaction were fair.... [A] great many employees participate in both plans." The loan was nonetheless a prohibited use of plan assets.

with all these limits, such use of plan assets for a non-plan employer benefit obligation falls within § 1103's ban on inurement to the employer. If it did not, there would have been no reason to add an express exception to § 1103.

Petitioners' claim that assets are being used to fund "benefits to plan participants" (Pet. Brf. 22) rests on a sharply disputed factual premise: that the Contributory Plan and the "new retirement plan" which Hughes announced in 1990 are not two plans but two "benefit structures." Petitioners echo Judge Norris:

> "The focus of our inquiry under ERISA's anti-inurement provision must be whether Hughes used Plan assets for a purpose other than the payment of benefits to Plan participants. The answer to that question is clearly no." Pet. Brf. 26-7, quoting Pet. App. 39a.

But if the Contributory Plan and "new retirement plan" are two separate plans, the answer, which petitioners agree is decisive, is "clearly yes." If there are two plans, *Lockheed*'s holding that it is proper for a plan to pay "benefits to the participants pursuant to its terms," 517 U.S. at 895, has no relevance.

Judge Gadbois ruled that "upon the face of Plan documents" the contributory and noncontributory "benefits structures" were not two plans. Pet. App. 58a. The face of Plan documents is obviously no basis to dismiss a complaint whose essence is that those documents are a sham meant to cover the reality which Hughes itself had earlier, more candidly, described when it announced "a new retirement plan" and contrasted "the existing retirement plan and the new plan." J.A. 198.

While 29 U.S.C. § 1002(3)'s definition of "plan" is not illuminating, ample precedent dating at least to *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982), shows the

criteria for judging when a "plan" exists: ascertainment of the benefits provided, the beneficiaries, the source of funding, and the procedures for receiving benefits. *See, e.g., McDonald v. Provident Indemnity Life Insurance Co.*, 60 F.3d 234, 235 (5th Cir. 1995); *Grimo v. Blue Cross/Blue Shield of Vermont*, 34 F.3d 148, 151 (2d Cir. 1994). Whether a plan exists in terms of these criteria has repeatedly been found to be a factual question. *See, e.g., Deibler v. Food and Commercial Workers Local* 22, 973 F.2d 206, 209 (3d Cir. 1992); *Wickman v. Northwestern National Insurance Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990); *Credit Managers Association v. Kennesaw Life and Accident Insurance Co.*, 809 F.2d 617, 625 (9th Cir. 1987). The table above contrasting the Contributory Plan and noncontributory plan -- drawn from Hughes' brochure announcing its "new retirement plan" (J.A. 198) -- shows that the two are (at the least) distinct enough under the *Dillingham* criteria so a claim they are two plans cannot be dismissed.

Implicitly recognizing that the existence of a factual question, whether there is one plan or two, is fatal to their position, petitioners argue that since "all assets in the Hughes plan are available to pay benefits under both the contributory and non-contributory benefit structures," both must be "a single plan as a matter of law." Pet. Brf. 27-8. Petitioners cite two regulations, 26 C.F.R. § 1.414(l)-1(b)(1) and 29 C.F.R. § 2520.102-4, which say that the existence of several benefit structures does not *preclude* finding a single plan. Whatever its relevance if plaintiffs sought judgment on the pleadings, this plainly does not support the defendants' claim that there is one plan as a matter of law.

26 C.F.R. § 1.414(l)-1(b)(1) also says, "A plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan." Petitioners say that this definition applies because "all assets in the Hughes plan are available to pay benefits under both the contributory and non-contributory benefit structures." Pet. Brf. 27. But as their own next sentence says, a crux of the complaint is

that such use of the assets is illegal. If there are two plans, based on facts recognized as determinative in *Dillingham* and other cases, Contributory Plan assets are *not* legally available to the noncontributory plan. Petitioners' argument is circular, based on the very factual claim (that there is one plan) which is in dispute.

It is not surprising that § 1.414(l)-1(b)(1) is not illuminating. By its terms, it applies only "[f]or purposes of" the Code's § 414(l) dealing with "the combining of two or more plans into a single plan."[11] § 414(l), according to § 1.414(l)-1(b)(1), does not even apply "unless more than a single plan is involved." Hughes is arguing that there have never been two plans.

The goal of § 414(l) and § 1.414(l)-1(b)(1) is to protect employees against having their entitlements reduced when two plans merge. Other contexts call for other approaches.[12] In general, as the Department of Labor has put it in an opinion consistent with court precedent already discussed, "whether there is a single plan or multiple plans is an inherently factual question." Opinion No. 96-16A, 1996 WL 491410 (E.R.I.S.A).

Examination of 29 U.S.C. §§ 1053 and 1054 confirms that Hughes itself knew the Contributory Plan and "new retirement plan" were separate plans. § 1054(c), which tells how to compute

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[11] 29 U.S.C. § 1058 is a companion, "labor" section of the Code's § 414(l). *Cf. Keystone Consolidated*, 508 U.S. at 160 (Congress adopted ERISA's "labor" and Code provisions in tandem).

[12] For example, 26 C.F.R.§1.401(a)(4) requires "disaggregating" what would for some purposes be one "plan," when applying nondiscrimination rules. The Code's § 4980(d)(5) treats what would for some purposes be two "plans" as one, when deciding if there is a "qualified replacement plan" after plan termination. *Cf. Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1290 (3d Cir. 1983) (regulations "serve a limited purpose... recognizing the dangers that employer manipulation of pension benefits may create").

the rights which § 1053 requires be nonforfeitable, differentiates defined benefit and defined contribution plans. Basically, the latter use actual investment earnings to compute nonforfeitable rights; the former use an imputed, usually lower rate of interest. But under § 1054(c)(4), if a defined benefit plan permits voluntary employee contributions, "the portion of an employee's accrued benefit derived from such contributions shall be treated" as if it arose in a defined contribution plan.

In the historic Contributory Plan, employee payments were a condition of participation: mandatory, for purposes of § 1054. But if it were true, as petitioners now claim, that the 1991 Restatement established a doublebreasted plan only one of whose "benefit structures" was contributory, this hybrid "plan" would have to be classified under § 1054 as one that "permits voluntary employee contributions." Under § 1054(c)(4), participants in the "contributory benefit structure" would have nonforfeitable rights based on actual plan earnings, as if they were participants in a defined contribution plan. The 1991 Restatement shows nothing of the kind. Relevant sections of Exhibit A (J.A. 135 and 148), like those of the old Contributory Plan (J.A. 72, 89), use an imputed interest rate. Hughes itself knew the Contributory Plan and noncontributory plan were separate: otherwise, § 1054(c) would have required different treatment.

In footnotes, petitioners suggest that even if there were two plans, 29 U.S.C. § 1058 authorized Hughes

> "to spin off participants in the non-contributory benefit structure -- along with surplus assets -- from the plan as long as participants in the contributory benefit structure continued to receive their defined benefits." Pet. Brf. 29 n. 6; *cf.* Pet. Brf. 26 n. 3..

The claim, which was not encompassed by the petition for certiorari, is also irrelevant and spurious. Hughes could not

possibly "spin off participants" who were never in the Contributory Plan. Nor does § 1058, as petitioners claim, let employers shift assets between plans as long as defined benefits are not affected. The Code's § 414(l) requires that even in an actual spinoff, each new plan receive "the applicable percentage of excess assets."[13] The complaint does not allege nor does Hughes claim that there has been a spinoff or a plan merger. A different factual question is decisive: whether the Contributory Plan and "new retirement plan" announced by Hughes are one plan or two.

C. Petitioners' arguments are wrong.

1. 29 U.S.C. §§ 1103, 1104 and § 1106 are express, independent statutory requirements.

§ 1103's anti-inurement rule, § 1104's fiduciary clause, and § 1106's bar on even "indirect... use by or for the benefit of a party in interest of any assets of the plan," are independent provisions of ERISA. They apply to *all* assets of a plan, not just those needed for promised benefits. A basic premise of petitioners' argument -- that the only obligation of a defined benefit plan is to pay the defined benefit (Pet. Brf. 1-2, 10, 13, 43) -- is wrong.

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[13] This means, as explained in 26 C.F.R. § 1.414(l)-1(b)(5) and (n), enough to fund "benefits on a termination basis in the plan before the spinoff," defined as what § 1344 would have required be paid had the plan terminated: not just defined benefits, but also other entitlements such as employees' statutory share of a plan surplus. *See Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 509 (2d Cir. 1994), (§ 1058, in a spinoff, requires allocation of fund assets in strict accordance with § 1344). *Cf. Holland v. Valhi Inc.*, 22 F.3d 968, 972 (10th Cir. 1994) (employer spinning off a plan could not allocate almost no surplus assets to participants who made 25% of contributions, even if this was the result of a calculation method presumptively correct under PBGC regulations).

ERISA does *not* only require that employers "honor their promises." Pet. Brf. 11. § 1103 requires, in addition, that plan asset s be held in trust and never inure to the employer's benefit. While § 1103 states an exception for assets reverting to the employer under § 1344 on plan termination, that exception never extends to assets attributable to employee contributions. For such assets, § 1103 is ironclad.

That ERISA's goals include protecting promised pensions does not mean specific statutory requirements can be ignored. "Vague notions of a statute's 'basic purpose' are nevertheless inadequate to overcome the words of the text regarding the specific issue under consideration." *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993). Nothing in §§ 1103, 1104 and 1106 suggests, much less says, that their requirements are excused if a plan pays promised defined benefits. The sections provide much of the basis for this Court's recognition that "ERISA abounds with the language and terminology of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). §§ 1104 and 1106 "insulate the trust from the employer's interest," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981), by requiring not just that promised benefits be paid, but that "decisions must be made with an eye single to the interests of the participants." *Donovan v. Bierwirth*, 680 F.2d 263, 272 (2d Cir. 1982). *Cf. Mazzola*, 716 F.2d at 1231. § 1106, as noted earlier, lists transactions which breach fiduciary duties *per se*, even if in a particular case they cause no harm. *Keystone Consolidated*, 508 U.S. at 160.

§§ 1103, 1104 and 1106 are all enforced even when defined benefits have all been paid. In *Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988), plan assets were invested in stock in which the employer had an interest. The employer, after terminating the plan, recouped a surplus including profits from resale of the stock. Not only had all promised benefits been paid, but the investment at issue had turned out well, yet the court

applied §§ 1103, 1104 and 1106 to hold that "a district court may impose a constructive trust on the ill-gotten profits and distribute them to plan participants and beneficiaries, even after they have received their actuarially vested plan benefits." *Id.* at 1408. *Cf. Leigh v. Engle*, 727 F.2d 113, 121-2 (7th Cir. 1984).

Petitioners imply that applying trust principles to a defined benefit plan means treating it like a defined contribution plan. Pet. Brf. 13, 33. §§ 1103, 1104 and 1106 govern both types of plan. In a defined contribution plan, money is held for individual participants. Assets of defined benefit plans are held for participants as a group, but held in trust nonetheless. It does not follow that assets, whether or not needed for defined benefits, may inure to the employer. The law expressly says that they may not.

2. The independent force of §§ 1103, 1104 and 1106, especially for assets attributable to employee contributions, is clear from ERISA's structure and history.

The independent force of §§ 1103, 1104 and 1106, especially for assets attributable to employee contributions, is clear not only from the statutory text, but also from ERISA's structure and legislative history. Petitioners argue repeatedly that ERISA was a compromise. Pet. Brf. 11, 14. In many respects, it was. Congress, for example, balanced the desirability of high vesting and funding standards for plans against the danger of discouraging employers from offering plans at all. *See* 2 Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, *Legislative History of the Employee Retirement Income Security Act of 1974* (hereinafter "*Legis. Hist.*") 2604, 3311. *Cf.* 2 *Legis. Hist.* 1834, 3 *Legis. Hist.* 3515 (discussing protection for surviving spouses). There was no compromise, however, about extending trust protection to assets attributable to employee contributions.

Even before ERISA, trust law protected the assets of most pension plans. As this Court said in *Varity Corp. v. Howe*, 516

U.S. 489, 496 (1996), trust-law requirements, under state common law, "governed most benefit plans before ERISA's enactment." The Code, too, conferred some trust protection on most employee plans.[14] Besides state common law and the Code, collectively bargained plans were governed by the Taft-Hartley Act, 29 U.S.C. § 186(c)(5), which conferred trust protections drawn from common law. *See Amax Coal Co.*, 453 U.S. at 329-31. Taft-Hartley required that plans be jointly run by unions and employers, to stop unions from using plan assets as a "war chest." 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947* 1312.[15]

What was new in § 403 was the requirement that assets of *every* employee benefit plan be held in trust and *never* inure to employers' benefit. Every proposed version of ERISA included these provisions,[16] whose purpose was threefold, as legislative

[14] The Code's § 401(a)(2) bars employers from recouping assets of tax qualified pension trusts until they are terminated. When ERISA was passed, the extent of employers' recoupment right under § 401(a)(2) even on termination was unclear. *See* Norman P. Stein, *Reversions from Pension Plans: History, Policies, and Prospects*, 44 Tax L.Rev. 259, 261, 279-81, 290-7 (1989).

[15] Specifically, Congress was angered by a United Mine Workers contract providing for payments

> "for indiscriminate use for so-called welfare purposes.... [I]f any such huge sums were to be paid, representing as they do the value...which could otherwise be paid... as wages, the use of such funds [should] be strictly safeguarded." *Id.* at 458.

[16] *See, e.g.*, H.R. 2 introduced Jan. 1, 1973, 1 *Legis. Hist.* 41; S. 4 introduced Jan. 4, 1973, 1 *Legis. Hist.* 169-70; S. 1179 introduced Mar. 13, 1973, 1 *Legis. Hist.* 946; S. 1557 introduced Apr. 12, 1973, 1 *Legis. Hist.* 307; H.R. 4200 twice passed by the Senate, 2 *Legis. Hist.* 2055, 3 *Legis. Hist.* 3597; H.R. 12906 introduced Feb. 20, 1974, (continued...)

history makes clear. First, Congress wished *all* plans to be protected by trust law. Second, it feared that precepts "developed in the context of testamentary and inter vivos trusts... with an attendant emphasis on the carrying out of the instructions of the settlor" left too much room for exculpatory clauses and similar devices. Trust principles were therefore to be applied in light of the special nature of employee benefit plans, the better to "protect the interests of plan participants." Finally, Congress hoped to unify law that "may differ from State to State." 1 *Legis. Hist.* 275; *cf.* 1 *Legis. Hist.* 591, 615; 2 *Legis. Hist.* 2351-2, 2358-9; 2 *Legis. Hist.* 3308. The only "compromise" struck in extending trust protection to plan assets is § 1344 allowing employer recoupment on plan termination. § 1103 is subject to an exception for surplus assets derived from employer contributions only.

Even this exception has repeatedly been narrowed. There is a "presumption against any reversion," which is allowed only on "specific and affirmative compliance" with the statute. *Rinard v. Eastern Co.*, 978 F.2d 265, 268 (6th Cir. 1992). Since employer payments to plans are tax-deductible, reversions of surplus on plan termination in effect let employers, under the guise of funding employee benefits, defer taxation on income which they later recoup. *See* Norman P. Stein, *Reversions from Pension Plans: History, Policies, and Prospects*, 44 Tax L. Rev. 259 (1989). By contrast, employee payments to plans must be made with after-tax dollars. To limit employer use of plans as tax shelters and encourage use for plan participants even of those plan assets derived from employer contributions, Congress repeatedly amended ERISA and the Code.

When first enacted in 1986, the Code's § 4980 imposed a 10% tax on assets recouped by an employer on plan termination. The rate was raised to 15% in 1988, and in 1990 -- just before

[16](...continued)
2 *Legis. Hist.* 2810-11, 2817.

Hughes adopted the 1991 Restatement -- to 20%, 50% unless the employer uses 25% of its potential reversion to benefit participants in the terminated plan. § 4980(d). These taxes are in addition to ordinary income tax. Thus for assets derived from employer payments, Congress has balanced interests as with other aspects of ERISA. For assets attributable to employee contributions, the protection of § 1103 is absolute.

Employer appropriation of plan surplus was one of the specific abuses which inspired § 1103. Lawmakers repeatedly mentioned the Elgin Watch Co., which after years in which only employees contributed to its pension plan, decided to terminate the plan to pocket its surplus. *E.g.*, 1 *Legis. Hist.* 1791. As one Congressman explained, "At the heart of the Elgin controversy was the question, 'who should be entitled to the excess funds' -- the pensioners or the company, which had come under the direction of new management." 3 *Legis. Hist.* 4710-11. In direct response, lawmakers sought "explicit provisions guaranteeing the rights of employees to some or all of the surplus upon termination of overfunded plans." *Retirement Income Security for Employees Act, 1973: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess., 193-202. The ultimate result was § 1344(d).

Petitioners, like Judge Norris, believe that in "economic reality," it should not matter

> "whether an employee makes contributions to a plan directly, or... indirectly through the employer. Either way, the contributions are the economic product of the employee's services." Pet. Brf. 20; Pet. App. 37a.

The short answer is that Congress saw a difference, "markedly distinguish[ing]," for example, "surplus assets... attributable to employee contributions and those attributable to employer

contributions." *Borst v. Chevron Corp.*, 36 F.3d 1308, 1315 (5th Cir. 1994).[17] Denial of a difference shows faulty reasoning and arrogance. Employees contributing to the Contributory Plan paid out of their own wages. That Hughes paid the wages no more makes employees' (after-tax) contributions identical to Hughes' (tax-deductible) contributions, than the fact that workers buy a car with wages means that Hughes bought them the car.

Had Congress in ERISA wished simply to require that defined benefits be paid, it could have said so. Fiduciary requirements would have had, at most, minor importance, since substantive requirements for plans, especially for plan funding, would have gone far to insure payment of benefits. There would have been no reason to require that plan assets be held in trust and never inure to the employer's benefit: no reason for § 1103.

This Court has contrasted ERISA fiduciaries' duty to act "*solely* in the interest of the participants" with an insurance company's duty "to consider the interests of all of its contractholders, creditors and shareholders." *John Hancock Mutual Life Insurance Co. v. Harris and Trust Savings Bank*, 510 U.S. 86, 97 (1993). Insurers promise defined benefits, are required to keep such promises, and are strictly regulated by state law; yet no one has ever suggested that their assets are held in trust and may not inure to the insurer's benefit. On the contrary, "[m]ost states treat the relationship between insurer and insured as a matter of contract, not a fiduciary relationship," *Hancock*, 510 U.S. at 119 (Thomas, J., dissenting), and the goal of most insurance companies is to make a profit.

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[17] *See also Chait v. Bernstein*, 835 F.2d 1017, 1025-6 (3d Cir. 1987), stressing that a plan whose surplus assets were being allowed to revert to the employer was wholly employer-funded, and contrasting *Delgrosso v. Spang and Co.*, 769 F.2d 928 (3d Cir. 1985), in which an employer that contributed nothing to a plan after it became a defined benefit plan was denied recoupment.

Similar rules apply to banks, and the PBGC was "modeled after the Federal Deposit Insurance Corporation" and federal agencies insuring savings and loans associations and brokerage houses. *Kinek v. Paramount Communications, Inc.*, 22 F.3d 503, 507 (2d Cir. 1994); 1 *Legis. Hist.* 1636, 3 *Legis. Hist.* 4794-5. Congress could have protected pension plans, like banks, without a sweeping trust requirement, but it chose not to. It discarded the idea of using "laws affecting insurance, banking and securities" to define fiduciary duties. 1 *Legis. Hist.* 617-8.

Far from regulating plans as states regulate insurance companies, Congress expressly declared in 29 U.S.C. § 1114(b) that an employee benefit trust shall *not* be deemed "to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking" under state law. § 1103(b) excepts from § 1103's requirement that plan assets be held in trust, "assets of a plan which consist of insurance contracts," assets of insurance companies with which plans deal, and "any assets of a plan which are held by such an insurance company." ERISA benefit plans are *not* profit-seeking insurance companies, but trust funds existing for their participants' sole benefit.

Petitioners argue that since an employer bears "the financial burden" of contributing to a plan if plan assets decline, it should "be entitled to the financial benefits" if assets rise. Pet. Brf. 33. Like Judge Norris in dissent, petitioners rely heavily on *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). That case likened workers who fund a defined benefit plan to

> "persons who purchase annuity contracts from insurance companies. They obtain a guaranteed stream of payments; the insurer (or, with pension plans, the employer) bears the investment risk." *Id.* at 1186.

§ 1103, however, means precisely that an employer which sponsors a pension plan is *not* thereby establishing a sideline insurance business in which it bears investment risk in exchange for a legal or beneficial right to plan assets. *Johnson*'s notion that "investment risk" entitles employers to profit from trust assets was not shared by Congress when it passed ERISA.[18] It has been specifically rejected by both the PBGC, and Congress when amending ERISA in 1987.

In adding to the statute § 1344(d)(3)'s express reservation to employees of surplus attributable to their contributions, Congress codified a right which the PBGC, affirmed by the D.C. Circuit, had already recognized. In doing so, the agency and court rejected arguments that "the employer bears the entire investment and actuarial risk"of declines in plan assets and therefore should profit from their rise. *Bridgestone/Firestone, Inc. v. PBGC*, 892 F.2d 105, 107 n. 2, 111 (D.C. Cir. 1989). Both when it originally passed ERISA and when it adopted the agency's view in a 1987 amendment, Congress rejected petitioners' argument about investment risk.

3. That amendments are not generally fiduciary acts is no basis to dismiss claims under §§ 1103, 1104 and 1106.

Petitioners argue that the complaint should be dismissed because plan amendments are not fiduciary acts. Pet. Brf. 13, 15-6,

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[18] During Congressional debate, opponents of the PBGC insurance program argued that it would discourage defined benefit plans because employers required to assume primary liability for PBGC-guaranteed benefits would no longer be able to limit their obligations: "[I]f the pension trust assets fall in value... , the employer will have to make up the difference." 2 *Legis. Hist.* 3389 *cf.* 2 *Legis. Hist.* 3398, 3463, 3476, 3 *Legis. Hist.* 3534-5, 4705. This is essentially *Johnson*'s argument about "investment risk." Congress ultimately passed ERISA with two dissenting votes. No one during debate said that employers' risk must be balanced by potential gain.

19. But § 1103, as the Ninth Circuit found, applies "whether or not the alleged conduct implicates ERISA's fiduciary obligations." Pet. App. 8a.[19] The United States agrees. U.S. Brf. 21. § 1103 is a structural, not just a fiduciary provision of ERISA: an example of the "other requirements" which *Lockheed*, 517 U.S. at 891, recognized govern plan amendments. That Hughes was plan sponsor did not entitle it to adopt an amendment violating § 1103.

Claims under §§ 1104 and 1106, which require a finding of fiduciary status, are also enforceable. Even if Hughes as plan sponsor was not a fiduciary when executing the 1991 Restatement, Hughes as administrator *was* a fiduciary when implementing and communicating about that document.

Lockheed cautioned that those implementing a plan amendment should not be found to have breached § 1106 without first "making the requisite finding of fiduciary status," but did not itself address the defendants' status since in any event, § 1106 had not been breached. 517 U.S. at 892. By treating separately a claim that implementation (as distinct from adoption) of an amendment breached fiduciary duty, *Lockheed* made clear that even an employer free to amend a plan may violate ERISA when implementing the amendment. Here Hughes, the Contributory Plan's administrator as well as sponsor (J.A. 21), breached §§ 1104 and 1106 by "utilizing excess Plan assets... for the exclusive benefit of defendant Hughes," and by "divert[ing] assets of the Plan to pay benefits to participants of the new non-contributory

[19] The petition for certiorari did not appear to challenge this holding. After certiorari was granted, petitioners added a new "question presented" (the second), and extensive argument referring to ERISA's anti-inurement clause. Pet. Brf. i, 22-7. *Lockheed* does not discuss § 1103 at all. On remand the Ninth Circuit found that Lockheed had not breached § 1103 since "plan assets were paid only to plan participants" and "Lockheed's Plan was a noncontributory pension plan." *Spink v. Lockheed Corp.*, 125 F.3d 1257, 1261 (9th Cir. 1997).

plan." J.A. 27, 30. Hughes as administrator also lied to participants in both plans, falsely telling them the new noncontributory plan would be "paid for entirely by Hughes." J.A. 201. Whether or not amending the Contributory Plan, by itself, was a fiduciary act, Hughes was certainly a fiduciary when as administrator, it misled participants about the amendment, and when it implemented the amendment by diverting Contributory Plan assets to pay Hughes' separate debt to the new noncontributory plan.

This Court stressed in *Firestone*, 487 U.S. at 112, 113, that a fiduciary in doubt about his duties "can protect himself by obtaining instructions from the court," and that a fiduciary is not

> "one who exercises *entirely* discretionary authority or control. Rather, one is a fiduciary to the extent he exercises *any* discretionary authority or control."

Cf. Keystone Consolidated, 508 U.S. at 164 (1993) (Stevens, J., dissenting) (trustee has right and duty to refuse plan sponsor's disadvantageous property transfer). *Varity*, 516 U.S. at 498, deferred to "factual findings" that an employer exercised discretion when communicating about an amendment as administrator and therefore, was a fiduciary. Judge Gadbois, by contrast, dismissed the complaint without a factual record and without even discussing whether Hughes as administrator of the Contributory Plan lied to participants and diverted Contributory Plan assets to improper use. Pet. App. 57a-58a, 60a.

The Ninth Circuit correctly found that the Plan's contributory nature supports claims of fiduciary breach. Not only was diversion of assets to meet a separate employer debt a *per se* breach of §§ 1104 and 1106, but Hughes as the administrator effecting such diversion breached § 1104 for a further reason. This Court has recognized that fiduciary duties under ERISA extend to future interests. *Varity*, 516 U.S. at 504. Besides their beneficial

interest in plan assets, participants in a contributory plan have a remainder interest in its surplus assets, under § 1344. On termination of the trust § 1344, as already discussed, lets employers recoup, at most, surplus derived from their own payments. Other remainder rights belong to the employee contributors -- a rule that like the rest of ERISA, has its roots in common law.[20]

A trust fiduciary's duty extends to remainder interests. *Bogert on Trusts & Trustees* § 541 at 163-6. *Cf. Restatement of Trusts* 2d, §§ 183, 232; *Scott on Trusts* § 183 at 560 (trustee who is also a beneficiary can be removed for favoring his own interest); 90 *Corpus Juris Secundum*, Trusts § 247 at 235-6 (if interests "are so conflicting that the fiduciary cannot deal fairly with respect to them, he cannot properly act without applying to the court"). The fiduciary may not ignore remainder rights. *See, e.g., Dennis v. Rhode Island Hospital Trust National Bank*, 744 F.2d 893, 896 (1st Cir. 1984) (Breyer, J.); *Matter of Great Northern Iron Ore Properties*, 263 N.W.2d 610, 621-2 (Minn. 1978); *DuPont v. Delaware Trust Co.*, 320 A.2d 694, 699 (Del. 1974); *Moore v. Smith*, 235 S.E.2d 102, 106 (N.C.App. 1977). At least when a conflict is between participants and the employer, ERISA fiduciaries' duty has been found to require them to protect

[20] *See Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir. 1989). The Supreme Court of Canada has lamented the lack of a Canadian statute specifying entitlements on pension plan termination but suggested, applying common law, that where both

> "employers and employees are (by virtue of their contributions) settlors of a trust, surplus funds remaining on termination can revert on a resulting trust to both employers and employees in proportion to their respective contributions."

Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611. That is the same result required by § 1344.

participants' termination interest in plan surplus. *Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325 (3d Cir. 1984); *cf. Mahoney v. Board of Trustees*, 973 F.2d 968, 972 (1st Cir. 1992) (Breyer, J.) (contrasting conflict between groups of plan participants). Hughes, seeking to evade employee remainder rights, diverted surplus of the Contributory Plan to its own use. Dissipating assets in derogation of a protected remainder interest is grounds to find a breach of fiduciary duty.

Lockheed reached its conclusion that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions" by extending a rule adopted for welfare plans in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). 29 U.S.C. § 1002(21), *Lockheed* explained, has one definition of "fiduciary" for all plans, and employers designing plans are generally "analogous to settlors of a trust." 517 U.S. at 891.

§ 1002(21) recognizes fiduciary status "to the extent" of "any... control respecting... disposition" of plan assets. These words, as *Varity* recognized, "are not self-defining." Some circumstances fall "clearly neither within nor outside of the common understanding" of the words, and in those circumstances, courts "look to the common law." 516 U.S. at 502. Factual questions must be addressed in "the specific context in which the events of [a] case occurred." *Id.* at 498-503. *Cf. Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992) (ERISA's unclear definition of "employee" implies a common-law test and requires assessment of the whole factual context).

Curtiss-Wright and *Lockheed* involved, respectively, a welfare plan and an employer-funded pension plan. A contributory pension plan differs from both. Welfare plans (unless collectively bargained) are nearly always pay-as-you-go, without significant assets. Pension plan assets attributable to employee contributions enjoy more protection under § 1103 than those derived from employer payments. Amendment of a welfare plan can almost

never be said to "dispose of" current plan assets. For a noncontributory pension plan like Lockheed's, but not for a contributory plan, there is an exception to § 1103. Even if actions with respect to all three types of plan are superficially similar, the "extent [of]... control respecting... disposition" of protected assets may be greater for a contributory pension plan than for a noncontributory pension plan or for a welfare plan.

Suppose that instead of half, employees made *all* contributions to a contributory plan. Since 1986, this has been true here. To find that despite § 1103's reservation to employee contributors of both the beneficial and the remainder interest in plan assets, there was no limit to the employer's right to revise such a plan to favor itself, would raise obvious questions about fairness. It is unlikely workers would pay the full cost of a pension to their employer (rather than an insurance company) knowing the employer could change the plan to profit from their payments. The employer would more likely sponsor the plan without any such right, to encourage employee loyalty. J.A. 61.

Lockheed referred to the broad powers of "settlors of a trust." Unlike "fiduciary," "settlor" is not a word which 29 U.S.C. § 1002 defines. As the Ninth Circuit said, when a plan is funded by both the employer and employees they are essentially "*co*-settlors." Pet. App. 14a. Such a description conforms to common law. One who supplies the assets for a trust may be "the settlor, even though in form the trust is created by another person." *Scott on Trusts* § 156.3 at 180 (4th ed. 1987). *Cf. Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1239 (9th Cir. 1990) (employer was not the settlor of a disability fund or entitled to its surplus assets, where employees paid the premiums); *Mine Workers v. Boyle*, 418 F.Supp. 406, 409 (D.D.C. 1976), *aff'd*, 567 F.2d 112 (D.C. Cir. 1977) (employer rather than beneficiaries was the settlor of a fund since "From its inception, the Pension Trust has been non-contributory"); *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 (Sup. Ct. of Canada) ("employers and employees are

(by virtue of their contributions) settlors" of a pension plan). Hughes was a fiduciary and breached its duty.

4. Dicta in *Johnson v. Georgia-Pacific Corp.* should not be followed.

Petitioners rely heavily on *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994). *Lockheed*, 517 U.S. at 891, cited *Johnson* for its analogy "to the settlors of a trust." While *Johnson*, unlike *Lockheed*, involved a contributory plan, its other facts bore no similarity to those here. The plan amendment in *Johnson* enhanced benefits for some plan participants; there was no claim that it "transferred assets from one plan to another or that the asset surplus was used to benefit employees who were not participants of the plan." Pet. App. 17a. While the facts of *Johnson* differ from those here, dicta in *Johnson* ignore § 1103.

Johnson's likening of employers with pension plans to for-profit insurers has already been discussed. Under ERISA, a plan sponsor is *not* in the insurance business. *Johnson*'s discussion of ERISA's definition of "fiduciary" is equally flawed. This Court, as already discussed, has recognized that the words of § 1002(21) must be applied in "the specific context" and "are not self-defining." *Varity*, 516 U.S. at 498, 502. By contrast *Johnson*, 19 F.3d at 1188-9, though admitting that "'use' and 'dispose of' could be synonyms," limited the meaning of "disposition" in § 1002(21)'s to

> "the common transactions in dealing with a pool of assets: selecting investments, exchanging one instrument or asset for another, and so on" -- an interpretation with no basis in ERISA, this Court's opinions or the dictionary.

Johnson argued that when ERISA refers to plan *assets*, it has "nothing at all to say about" plan liabilities. *Id.* at 1189. If that were right, a fiduciary barred from imprudently investing plan

assets, could freely pledge them as security for a personal loan. It is obvious that ERISA does *not* allow plan assets to inure to employer's benefit through increases in plan liabilities. It is also not correct to say, like *Johnson*, that since "[i]n bad times (when declines in the value of assets make plans underfunded) employers must contribute more," it is "asymmetric" not to let them profit from plan surpluses in good times. *Id.* at 1190.

There is no lack of symmetry. In bad times employers contribute more, in good times less. More important, this reduction in contributions is the *only* sense (apart from the express exceptions to § 1103) in which plan surpluses may benefit employers.[21] At best, *Johnson*'s warning that employers will establish fewer plans unless they can do so for profit, 19 F.3d at 1190, is "thoughtful speculation, but speculation nonetheless." *Swidler & Berlin v. United States*, 118 S.Ct. 2081, 2088 (1998).[22] At worst, it exemplifies how an economic theorywhose application in practice is untested can undermine an express statute.

Employers including Hughes establish plans because they believe this helps them attract and retain employees. JA. 61. The trade-off between regulation of plans and employer willingness to sponsor them is one that Congress took into account in ERISA when setting minimum vesting, funding and other standards. It

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[21] It does not follow, as the United States implies, that an employer which "may benefit... by ceasing contributions" should also be free to use surplus assets for a different plan. U.S. Brf. 23. That employers may benefit in one sense but not the other is "merely a necessary consequence of the need to draw a line somewhere." *Geissal v. Moore Medical Corp*, 118 S.Ct. 1869, 1875 (1998).

[22] The answer to a similar concern, that if employers lack access to plan surpluses they will not fund plans adequately, was given in *Amatao v. Western Union International, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1983): "This concern is diminished by ERISA's provisions insuring at least minimum funding."

does not license courts to redesign the statute. When this Court has said that a flexible legal regime encourages "employers to offer more generous benefits," it has also recognized that ERISA nonetheless limits employer freedom of action and that invoking such freedom "does not, as the Court of Appeals apparently thought, justify a departure from... plain language." *Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co.*, 117 S.Ct. 1513, 1516 (1997). Nothing suggests that Congress thought employers should profit from pension trust assets: a practice specifically prohibited by § 1103. "Logic" like *Johnson*'s could equally oppose *any* limit on employer freedom, even enforcement of employer promises. *See* Seth Kupferberg, *Double Effects in Economics and Law, with Special Reference to ERISA*, 73 *Ore.L.Rev.* 467, 500 (1994). Regardless of what a judge might deem wisdom, § 1103 is where Congress drew the line.

With more logic, one can foresee consequences if the complaint here is dismissed. Hughes, as argued above, is accused of precisely the kind of conduct §§ 1103, 1104 and 1106 aimed to prohibit. Like a pre-Taft-Hartley union, it is taking huge sums deducted from employee wages for indiscriminate use. It is evading the tax on employer reversions which Congress increased just before the actions challenged here, appropriating more than the amount of a legal plan reversion, and shifting part of the tax burden to employees who to remain in the Contributory Plan, must continue contributing (for Hughes' use) out of their after-tax wages. Like Elgin Watch, Hughes is using Contributory Plan surplus to pay for "meager pensions to retirees [under the noncontributory plan], and a tax-free bonanza to [Hughes'] shareholders." 1 *Legis. Hist.* 1791. If this complaint is dismissed, such unusual facts may become more commonplace.

The essence of petitioner' argument is that employers may use the assets of a pension plan, including those attributable to participant contributions, not only for benefits to participants in that plan, but also for any other pension obligation. In practice, the

loophole opened would have virtually no limit, and trust assets, including those from employee payments, could be used for almost any corporate strategy. Here, Hughes used Contributory Plan assets largely attributable to employee contributions to fund a new plan for different Hughes employees. Next time, it might transfer assets to GM's underfunded plan. Plan assets could also be used to finance corporate acquisitions. Instead of writing a check on its own funds, the acquiring company could use plan surplus to meet the acquired company's benefit obligations.[23] Employers could also use pension plan assets, including those derived from employee payments, to settle unrelated claims by employees who are *not* participants in the plan, by simply "amending" the plan to grant them benefits. § 1103 outlaws such acts, but if "amending" a plan were deemed an unreviewable act, the statute would have little force. The complaint states a valid claim.

III. THE § 1344 CLAIM IS NOT SUBJECT TO DISMISSAL.

A. Employers can be ordered to use Title IV procedures.

Petitioners argue that since Hughes has not used Title IV procedures there cannot be a termination of the Plan. Pet. Brf. 10, 34-37. When this argument first surfaced, after the Ninth Circuit panel decision, plaintiffs responded (and now repeat) that they seek

> "an order that a wasting trust be terminated in accordance with the procedures of Title IV of ERISA, including submission to the PBGC. If there is any doubt, plaintiffs so state here and now." Response Opposing Petition for En Banc Rehearing filed September 5, 1997 at 2.

[23] As previously noted, the "sales price" in the emrger of Raytheon and Hughes undoubtedly reflected the fact that Hughes was paying its debt to the noncontributory plan with the Contributory Plan's money.

Distribution under § 1344, referred to in the complaint, is simply the last step in plan termination under Title IV.

The United States objects that the complaint "alleges that the plan in fact terminated." U.S. Brf. 15. In retrospect, the complaint would have been clearer had it said not that Hughes "terminated the Plan" and "as such" is bound by § 1344, but that Hughes' acts required it to terminate the Plan under Title IV. The complaint can be amended if it is deemed confusing. Judge Gadbois dismissed without leave to amend. Pet. App. 62a.

The issue for this Court is not whether a plan can only be terminated through Title IV means, which no one denies, but whether a court can order an unwilling employer to use those procedures. The United States -- unlike petitioners, and receding from the PBGC's earlier position -- agrees that the answer may be "yes," but says the Court need not reach the issue. U.S. Brf. 15-16 and n. 5. Contrary to petitioners, a court can order Title IV procedures used.

Petitioners admit courts "enforce an employer's *contractual* promise to terminate a plan" by ordering use of Title IV procedures. Pet. Brf. 41 n. 8, acknowledging *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), and *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990). In doing so, a court applies common-law contract principles. It makes little difference if the court applies the common law of trusts: either way, it applies common law to compel a now-unwilling employer to follow through on its once-voluntary commitment. There is perhaps no more firmly established ERISA precept, most recently reaffirmed in *Varity*, than that courts applying ERISA look to the law of trusts.

In re Gulf Pension Litigation, 764 F.Supp. 1149 (S.D. Tex. 1991), *aff'd in part sub nom.*, *Borst v. Chevron Corp.*, 36 F.3d 1308

(5th Cir. 1994), applied the common law of trusts, on a "wasting trust" theory substantially identical to the one here, and required that an employer terminate two pension plans using Title IV procedures. The case is discussed below. Besides *Bebber* and *Gulf*, which ordered employers to use Title IV procedures, and *Beaumont Glass*, which reversed dismissal of a complaint seeking such an order, *Matter of Esco Manufacturing Co.*, 50 F.3d 315 (5th Cir. 1995), strongly implies a court can issue such an order. *Esco* reversed a district court's order that a bankruptcy trustee terminate the debtor's pension plan, because the trustee was the successor of the plan sponsor while Title IV proceedings must be initiated by the plan administrator. The finding that "The district court erred... in holding that the trustee had the power to terminate the plan" implies that an order that an administrator do so could be proper.[24]

A court's power to order employers to use Title IV procedures is supplied by §§ 1109 and 1132 which authorize equitable relief, respectively, to redress a breach of fiduciary duty and to enforce ERISA. *Cf. Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (§ 1109 allows court to appoint receiver); *Corley v. Hecht Co.*, 530 F.Supp. 1155, 1164 (D.D.C. 1982) (requiring employer to nominate successor fiduciary). Fiduciary duties extend to responsibilities created by ERISA. *Central States*, 472 U.S. at 572. It is the administrator, a fiduciary, and not the plan sponsor which is empowered by § 1341 to file the notices required for plan termination. *See Esco, supra.* If a sponsor blocks the use of trust assets for the trust's beneficiaries, the administrator may have an obligation to terminate the plan. § 1103, similarly, may

[24] Withdrawn opinions in *Esco*, 33 F.3d 509 (5th Cir. 1994), make the underlying situation clearer. The original majority and dissent agreed, *Id.* at 515 and 518, that "Someone must shoulder the responsibility for terminating the pension plan," but the dissent called it unnecessary to make the trustee act and create a conflict with bankruptcy law since "ERISA provides an alternative," a PBGC-initiated distress termination under 29 U.S.C. § 1342. For the overfunded Contributory Plan this alternative does not exist.

require plan termination if plan assets are inuring to the employer's benefit.

The obvious point of much of Title IV, including § 1344, is to protect employees. If an employer could evade these protections by refraining from formal notice of a plan termination, the protections would have little meaning. Once again, a hypothetical example may make this clearer. Suppose that instead of barring new participants and using Contributory Plan assets to pay for a different plan, Hughes had closed participation in the already overfunded Contributory Plan, then simply waited for all its beneficiaries to die. At some point it would be obvious, even without expert testimony, that the Contributory Plan's still-growing surplus would never be used for its participants. At least for a contributory plan for which Congress has established a remainder interest in the participants, this result is impermissible. Hughes would be breaching §§ 1103 and 1104, and jurisdiction to order use of Title IV procedures would exist under §§ 1109 and 1132. The same is true here.

Petitioners stress that a regulation cited by the Ninth Circuit which says that "whether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances" predates ERISA. Pet. Brf. 38, citing 26 C.F.R.§ 1.401-6(b)(1). While plans now terminate through Title IV, whether use of those means is required may be illuminated by what constituted a termination under the Code. *Cf. Gluck v. Unisys Corp.*, 960 F.2d 1168, 1184 (3d Cir. 1992) (tax rules relevant, though not controlling, in ERISA determination). § 1341 now sets the "exclusive means" for plan termination, but does not address how or when termination (through those means) can be required. In the same way, ERISA's provisions concerning plan amendment, following "standard trust law principles," do not address courts' power to test the adoption of amendments against what is required by corporate law. *Curtiss-Wright*, 514 U.S. at 84-5.

This is one of many instances under ERISA in which substance, not just procedure, matters. Under 26 C.F.R. § 1.404(a)(26), whether a plan provides "meaningful benefits" is also decided "on the basis of all the facts and circumstances." More directly relevant to Title IV, the existence of a "follow-on" plan precluding termination under PBGC rules upheld in *PBGC v. LTV Corp.*, 496 U.S. 633 (1990), depends on the "substantial identity" of benefits before and after the termination. In that case this Court, adopting the PBGC's view, found the permissibility of plan termination ultimately a question of economic substance, which the employer could not simply foreclose by choosing whether to file a notice of intent to terminate. Here as in other instances, what ERISA requires can only be assessed in light of specific facts.

B. Whether Hughes should be ordered to terminate the Contributory Plan depends on disputed factual issues.

The complaint alleges that by closing the Contributory Plan to new participants, Hughes created an actuarial certainty that a large portion of surplus Plan assets, including those from employee contributions, would never be used for Contributory Plan participants. Common-law courts in such circumstances ordered trusts, often called "dry," "wasting" or "resulting" trusts, terminated and their assets equitably distributed.

> "A resulting trust arises when an express trust fails in whole or in part, or the purposes are fully accomplished without exhausting the trust property.... [T]he trustee can be compelled to convey the property to the beneficiary." *Restatement of Trusts* 2d, § 73 (also stating that a constructive trust may arise to prevent unjust enrichment).

Resulting trust principles have been applied to pension plans. *See, e.g.*, *Pollock v. Castrovinci*, 476 F.Supp. 606, 616-7 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 575 (2d Cir. 1980);. *Schmidt v. Air Products Canada Ltd.*, [1994] 2 S.C.R. 611 (Sup. Ct. of Canada) (on plan termination, common law creates a resulting trust for those who contributed to a pension plan, rejecting claims that "a pension plan constitutes a trust whose sole purpose is to provide defined benefits"). The allocation of surplus on plan termination which is prescribed by § 1344 resembles a common-law resulting trust:

> "If several persons contribute to a fund... and the purpose is fully exhausted without exhausting the trust property... a resulting trust of the surplus will arise in favor of the contributors... in proportion to their contributions." *Restatement of Trusts* 2d, §§ 399(n) and 400(d) (also referring to such contributors as "settlors").

The point is not, as Judge Norris seems to have thought, that "the non-contributory benefit structure somehow had the effect of converting the Plan into a 'wasting or dry trust.'" Pet. App. 42a. The point, rather, is that closing participation in the *Contributory* Plan, which capped its potential liability to Contributory Plan participants at a level far below surplus assets, had this effect. Facts alleged here are substantially identical to those in *In re Gulf Pension Litigation*, *supra*, where the court (in a holding not appealed) concluded that a plan rendered a wasting trust must be terminated, and ordered the defendant "to submit termination papers to PBGC." 764 F.Supp. at 1204-5, 1216.[25] *Cf. Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F.Supp. 359, 372 (N.D.Ga.

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[25] The *Gulf* complaint, like this one, alleged that plans "should be terminated" and surplus distributed. 764 F.Supp. at 1201. The court found the plans wasting trusts and that there was equitable power to order them spun off from a plan into which they had merged, and terminated "according to the terms of the Final Judgment." *Id.* at 1204-5. That judgment, *Id.* at 1216, ordered the employer to take "ministerial steps" including filing with the PBGC.

1986) (ordering termination of defined contribution plan to prevent benefits from "end[ing] up in legal limbo forever").

That benefits are still being paid and some Contributory Plan participants continue to accrue benefits does not address the key point: that Contributory Plan assets substantially exceed those needed for "all current and future pensions of participants." J.A. 26. In *Gulf*, the wasting trusts were also still paying benefits and had current participants with projected benefits from future service of $4 million, "*de minimis* in relation to the surplus." 764 F.Supp. at 1203. That a plan is paying benefits does not make it "well-operating," Pet. Brf. 14, if assets are accumulating for the employer's rather than participants' benefit. Factual questions such as the amount of projected future benefits or how many millions are *de minimis* cannot be decided on a motion to dismiss, as the Ninth Circuit recognized. Pet. App. 11a and n. 3, 21a n. 6.

Petitioners, and amici which support them, argue that Plan surplus "is a cushion for bad times" and that to terminate the Contributory Plan would not be good for participants. Pet. Brf. 42; U.S. Brf. 17, Hughes Aircraft Retirees' Association Brf. 4-9. This amounts to little more than disputing the facts. The briefs argue that active employees who participate in the Contributory Plan should not be stopped from accruing additional benefits, ignoring the essence of plaintiffs' allegation: that the Contributory Plan's assets are so large it can pay all future, as well as current, accruals, and still be left with hundreds of millions of dollars of surplus assets which must be distributed under § 1344.[26]

The district court can consider any facts tending to show that termination is unnecessary, as well as whether the plaintiffs, who are

[26] HARA's assertion that the Department of Defense might seek to reclaim a part of the pension surplus is not only speculative, but at most involves the portion of surplus derived from Hughes' rather than employees' payments.

seeking class certification, speak for participants in the Contributory Plan. These issues are factual, not a basis to dismiss the complaint. Testimony might show, for example, that Contributory Plan assets suffice to pay future benefits by buying guaranteed annuities or Treasury notes, while still leaving a surplus that should be distributed, not diverted to pay Hughes' debts. Though time and chance may happen to all, *Ecclesiastes* 9:11, no tablet says that Contributory Plan surplus (now being siphoned off by Hughes) is ephemeral as a matter of law .

Petitioners and supporting amici also point to complexities posed by the termination process, such as the difficulty of setting a termination date when Hughes has delayed filing a notice of intent to terminate. Pet. Brf. 40; U.S. Brf. 15. These questions must be addressed by the PBGC in the first instance. In exceptional cases, retroactive termination dates can be proper, as the PBGC and courts have recognized. *See In re Braniff Airways, Inc.*, 24 B.R. 466, 470 (Bkrtcy. Tex. 1972); *Harris & Sons Steel Co.*, 706 F.2d at 1295 n. 15. Plan administrators in such cases "may be liable to PBGC or participants for losses caused by delay" in filing. Opinion No. 82-25, 1982 WL 21123 (P.B.G.C.) .

Normal methods for allocating surplus "equitably," as required by § 1344, can be modified if necessary to protect certain participants. *Cf. Valhi*, 22 F.3d at 972 (modifying presumptively appropriate method of calculation). In any event, an order that the Contributory Plan terminate is not the only remedy requested by the complaint. J.A. 31. Other remedies which might ultimately be considered, for example an improvement in benefits so surplus can be used, should likewise be discussed in a developed factual context.

The United States argues that the Contributory Plan's purposes are not accomplished. U.S. Brf. 10, 16-17. The Ninth Circuit rightly found that a factual question. Pet. App. 11a. "The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the

circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'" *Firestone*, 489 U.S. at 112. One purpose of § 1103, as discussed earlier, was to modify traditional trust law's emphasis on settlor instructions when this did not "adequately protect the interest of plan participants." 1 *Legis. Hist.* 275. There is nothing in the record about the Plan's purposes as stated in pre-1985 documents. *Cf. Hickerson v. Velsicol Chemical Corp.*, 778 F.2d 365, 376-80 (7th Cir. 1985) (original plan documents did not permit recent amendment). Nor is it even clear, as discussed earlier, who should be treated as settlor(s) of this contributory trust. These are all questions which this Court "need not here answer and which would benefit from further development in the lower courts." *Lockheed*, 517 U.S. at 898 (Breyer, J., concurring and dissenting).

Even taking at face value documents from defendants which state the Contributory Plan's purpose as stimulating "eligible employees" (J.A. 61), there is a factual question whether Contributory Plan assets will be used to benefit those employees or will, to an actuarial certainty, be diverted to Hughes' separate debt for benefits due new workers who are *not* eligible for the Contributory Plan, or to other corporate purposes. The Ninth Circuit was correct in finding that whether the Contributory Plan's purposes are accomplished and its liabilities fixed are factual questions. The question now before this Court -- whether a district court can, if the facts so warrant, order an employer to use Title IV termination procedures -- should be answered in the affirmative.

III. THE § 1053 CLAIM IS NOT SUBJECT TO DISMISSAL.

Petitioners argue that nothing in ERISA "creates any entitlement to investment income generated by employee contributions." Pet. Brf. 31. 29 U.S.C. § 1053 requires that employee rights in accrued benefits derived from their own contributions be nonforfeitable, and § 1054(c)(2) defines such nonforfeitable rights to include mandatory employee contributions

plus an imputed rate of interest. If those exceed promised defined benefits, they are nonetheless nonforfeitable.

Petitioners admit that § 1053 might be breached "by depleting plan assets that are needed" for nonforfeitable accrued benefits. Pet. Brf. 32. This is precisely what plaintiffs allege. The claim is not contradicted by allegations that the Contributory Plan is overfunded. Particularly in a Plan which continues to require employee contributions long after all present and future defined benefits are fully funded, "accumulated contributions" as defined in § 1054 may exceed the accrued benefits against which plan surplus is measured. By depleting Contributory Plan surplus, Hughes threatens a forfeiture of protected benefits.[27]

CONCLUSION

We end as we began -- with petitioners' "pot of gold." In Irish folklore, leprechauns hid gold at the rainbow's end. Hughes' means of gathering the assets it claims may indeed be like that of leprechauns: "In the night time we go about the country into people's houses and we clip little pieces off their money, and so, bit by bit, we get a crock of gold together." James Stephens, *The Crock of Gold*, ch. 8 (1912). Leprechauns, though, were small hard-working shoemakers saving a ransom for use if captured. Hughes just wants to pay its bills with employees' money. It resembles a leprechaun mainly in grasp and cunning.

ERISA requires that plan assets, especially those attributable to employee contributions, be held in trust and never inure to the

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[27] As discussed earlier, if petitioners were correct in saying that the Contributory Plan and noncontributory plan are two "structures" of one plan, that hybrid, for § 1054 purposes, would have to be deemed a defined benefit plan that "permits voluntary employee contributions." Participants in the "contributory structure" would be entitled to investment earnings instead of the imputed rate.

employer's benefit. If that principle is eroded, abuses which ERISA aimed to stop will resurface. Regardless what "investment risk" it can be said to run, a plan sponsor under ERISA is not an insurance company. An employer cannot dip into the pot of plan assets -- especially when the pot was filled by employees -- to meet its non-plan debts. For these reasons, the judgment reversing dismissal of the complaint must be affirmed.

Dated:
August 17, 1998

Respectfully submitted,

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APPENDIX

HUGHES NON-BARGAINING RETIREMENT PLAN

THIS AGREEMENT executed by HUGHES AIRCRAFT COMPANY, a corporation organized under the laws of the State of Delaware (hereinafter "Company"), evidences the terms of the Hughes Non-Bargaining Retirement Plan (hereinafter "Plan"). This Plan is one of two plans resulting from the split of the Hughes Retirement Plan, originally effective January 1, 1951, and subsequently amended from time to time thereafter. The other plan resulting from the split is known as the Hughes Bargaining Retirement Plan. In order to comply with the requirements of the Tax Reform Act of 1984 and the Retirement Equity Act of 1984, this further amendment to the Plan is effective, unless otherwise specifically stated, as of January 1, 1985 as to persons who were Employees or who retired on or after such date. For Employees who terminated or retired prior to January 1, 1985, benefits shall be determined by the Hughes Non-Bargaining Retirement Plan in effect prior to January 1, 1985, or if applicable, by the provisions of the Hughes Retirement Plan in effect prior thereto.

The purposes of the Plan are:

(1) To stimulate and maintain among eligible employees of the Companies, a sense of responsibility, cooperative effort and a sincere interest in the progress and success of the Companies.

(2) To increase the efficiency of such Employees and to encourage them to remain with the Companies until retirement from active service.

The Plan is a qualified pension plan which is intended to comply with the provisions of Section 401 and other applicable provisions of the Internal Revenue Code, similar provisions of the California Revenue and Taxation Code, Section 7(d)(4) of the Fair

Labor Standards Act of 1938, as amended, and the Employee Retirement Income Security Act of 1974.

ARTICLE I

DEFINITIONS

Section 1.1 - General

Whenever any of the following terms is used in the Plan with the first letter capitalized, it shall have the meaning specified below unless the context clearly indicates to the contrary.

Section 1.2 - Accounting Month

"Accounting Month" as to a Participant means the month, or four-or-five-week period, regularly used by this Company for its accounting records. With respect to years prior to 1976, an Accounting Month shall be one-twelfth of a calendar year.

Section 1.3 - Accrued Benefits

The "Accrued Benefit" of a Participant, as of his Separation from the Service, means the greatest of (a), (b), or (c):

(a) the greater of

(i) his Normal Retirement Benefit determined under Section 4.2, without regard to Section 4.3, but with reference to the greater of the alternative Benefits under Section 4.4 or 4.5, calculated on the basis of his Benefit Accrual Service as of such Separation from the Service, or

(ii) paragraph (i) of subsection (a) - calculated - as if the Separation from the Service of the Participant were on March 1, 1982, as if all Compensation for the month of February 1982 were the figures shown as paid on the Company's records ending with the last payroll period ending before March 1, 1982, and as if all the Participant's vacation not taken as shown at close of a Company's records for the February 1982 accounting month were paid to the Participant within such payroll period.

(b) the greater of

(i) his Normal Retirement Benefit determined under Section 4.3 as if

a there were added to his Total Benefit Accrual Service the period from the date of such Separation from the Service to his Normal Retirement Date and

b his Primary Insurance Amount were determined under Section 1.45, or

(ii) paragraph (i) of subsection (b) calculated as if the Separation from the Service of the Participant were on March 1, 1982 as if the Compensation for the month of February, 1982 were the figures shown as paid on the Company's records ending with the last payroll period ending before March 1, 1982, and as if all the Participant's vacation not taken as shown at close of a Company's records for the February 1982

accounting month were paid to the Participant within such payroll period.

(c) the Actuarial Equivalent of his total Participant Contributions without interest, exclusive of Participant Contributions made prior to a break in Continuous Service commencing before 1976.

Section 1.4 - Accrued Benefit Derived from Company Contributions

The "Accrued Benefit Derived from Company Contributions" of a Participant as of his Separation from the Service means that Benefit equal to the excess (if any) of the Participant's Accrued Benefit over his Accrued Benefit Derived from Participant Contributions.

Section 1.5 - Accrued Benefit Derived from Participant Contributions

The "Accrued Benefit Derived from Participant Contributions" of a Participant as of his Separation from the Service means the lessor of

(a) his Accrued Benefit, and

(b) his annual benefit in the form of a single life annuity (without ancillary benefits) commencing at Normal Retirement Age, equal to the Participant Contributions Account multiplied by the appropriate conversion factor of 10% multiplied by an actuarial adjustment factor of 68%, or such other percentage as may be required by law.

Section 1.6 - Actuarial Equivalent: Actuarially Equivalent

"Actuarial Equivalent" or Actuarially Equivalent" means the equivalent of a given Benefit or a given amount payable in another manner or by other means, determined conclusively by or under direction of the Administrator based upon the interest rate and the table of adjusted mortality rates determined as follows:

(a) the interest rate shall be:

(i) for the plan year commencing January 1, 1982, 7%;

(ii) for that in the year in which benefits commence shall be used to determine the mortality rate.

(iii) for the plan year commencing January 1, 1984, 75% of the immediate annuity rate in effect for January 1, 1984 in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(iv) for the plan year commencing January 1, 1985, 80% of the immediate annuity rate in effect for January 1, 1985, 80% of the immediate annuity rate in effect for January 1, 1985 in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(v) for the plan year commencing January 1, 1986, 80% of the immediate annuity rate in effect for October 1, 1985, in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(vi) for the plan year commencing January 1, 1987, 90% of the immediate annuity rate in effect for October 1, 1986 in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(vii) for the plan year commencing January 1, 1988, 95% of the immediate annuity rate in effect for October 1, 1987 in Appendix B of

Pension Benefit Guaranty Corporation Regulation Section 2619;

(viii) for the plan year commencing January 1, 1989, and for each plan year thereafter, 100% of the immediate annuity rate in effect for the October 1st preceding each such year, in Appendix B of Pension Benefit Guaranty Corporation Regulation Section 2619;

(b) the table of adjusted mortality rates is a table of ages and corresponding annual mortality rates. The mortality rates are calculated by combining 80% of the rate for males and 20% of the rate for females from the 1971 Group Annuity Mortality Table. The attained age of the Participant in the year in which benefits commence shall be used to determine the mortality rate.

<u>Section 1.7</u> - <u>Administrator</u>

"Administrator" means "HUGHES AIRCRAFT COMPANY, acting through its officers or their delegates, and not through its Board of Directors, except that during such time as a Committee is in existence, such Committee shall be the Administrator. The Administrator shall function as provided in the Plan, the Trust Agreement and ERISA.

<u>Section 1.8</u> - <u>Anniversary Date</u>

"Anniversary Date" of a Participant means an anniversary of the later of

(a) his first day on the job after his first employment by a Company while a Company, and

(b) his first day on the job after his first rehire by a Company following his most recent break in Continuous Service commencing before 1976.

Section 1.9 - Annuity Starting Date

"Annuity Starting Date" of a Participant means the Early, Normal, or Late Retirement Date of a Participant, as determined by the provisions of the Plan relating thereto, or such date as may be elected by a Participant, provided:

(a) Such election is made prior to a Separation from the Service by giving written notice to the Administrator; and

(b) Such date is not more than ten years later than the Participant's Normal or

(c) The present value of Benefit payments to be made to a Participant as the Annuity Starting Date is more than 50% of the present value of the total of Benefit payments to be made to the Participant and any Beneficiary, except where such Beneficiary is the spouse of the Participant; and

(d) For distributions made on or after January 1, 1985, the entire interest of the Participant will be distributed in accordance with either of the following:

(i) not later than April 1 of the calendar year following the later of:

a the calendar year in which the Participant attains Age 70-1/2, or

b the calendar year in which the Participant retires. Subparagraph b shall not apply in the case of a Participant who is a five percent owner as defined in Section 416 of the Code during the Plan Year ending in the calendar year in which the Participant attains age 70-1/2; or

(ii) commencing no later than the taxable year described in paragraph (I) and payable over the life of the Participant or over the lives of the Participant and any Beneficiary, or over a period not exceeding the life expectancy of the Participant or over the joint life expectancies of the Participant and any beneficiary.

Any Participant who has properly elected an Annuity Starting Date may revoke such election and make a new election at any time while employed by the Company by giving written notice to the Administrator.

Section 1.10 - Beneficiary

"Beneficiary" means a person or trust designated in writing from time to time by a Participant or Former Participant to receive Benefits in the event of his death, as provided in Sections 4.2, 4.8, 4.10, 4.11, 4.12, 4.14, 4.17, 6.1 or 6.9, or if no effective designation is made, then his spouse and if there is no spouse, then his heirs determined under the laws of the state of his residence.

Section 1.11 - Benefits

The "Benefit" of a Participant means payments payable in the amounts, to the persons, at the times, and over the applicable

period (including any final lump-sum payment) specified in Article IV.

Section 1.12 - Benefit Accrual Service

"Benefit Accrual Service" of a Participant means the total, expressed in years and fractional years, of

(a) those Accounting Months (treating each Accounting Month as one-twelfth year and excluding Accounting Months commencing before a break in his Continuous Service commencing before 1976) for any part or all of which he made contributions to the Plan as a Participant, Union Officer, or participant in the Income Insurance Plan; and, as applicable, either

(b) for a person employed by a Company on January 1, 1980, benefit accrual service credited to such Employee under the Hughes Retirement Plan prior to January 1, 19809, provided such Employee satisfied the requirements of Section 2.1(b)(iii) of the Plan on such January 1st, or

(c) for a former Employee not employed by a Company on January 1, 1980, benefit accrual service credited to such former Employee under the Hughes Retirement Plan prior to January 1, 1980, provided such former Employee's last job classification satisfied the requirements of Section 2.1(b)(iii) of the Plan.

Section 1.13 - Board

"Board" means the Board of Directors of HUGHES AIRCRAFT COMPANY actions as such or by and through its Executive Committee.

Section 1.14 - Break in Service Year

A "Break in Service Year" of an Employee or former Employee means a period of fifty-three weeks (using his regular payroll week) ending with the week in which his Anniversary Date falls, if

(a) at the end of such period he is not an Employee,

(b) such period ends before his Normal or Early Retirement Date, and

(c) during such period he did not have more than five hundred Hours of Service.

For purposes of determining whether a Break in Service Year has occurred for participation and vesting purposes, an Employee who is absent from work that commences for maternity or paternity reasons shall receive credit for the Hours of Service which would otherwise have been credited to such Employee, but for such absence, or in any case in which such hours cannot be determined, eight hours of service per day of such absence. For purposes hereof, an absence from work for maternity or paternity reasons means an absence by reason of the pregnancy of the Employee, by reason of a birth of a child of the Employee, by reason of the placement of a child with the Employee in connection with the adoption of such child by such Employee, or for purposes of caring for such child for a period beginning immediately following such birth or placement. The Hours of Service credited hereunder shall be credited in the computation period in which the absence begins

if the crediting is necessary to prevent a Break in Service Year in that period, or in all other cases, in the following computation period.

Section 1.15 - Committee

"Committee" means the Administrative Committee, if any, appointed in accordance with Section 5.3.

Section 1.16 - Company; Companies

As the context requires, "Company" or "Companies" means HUGHES AIRCRAFT COMPANY, any other corporation listed on the signature pages of the Plan, any corporation which subsequently adopts the Plan as a whole or as to one or more divisions in accordance with Section 6.6, and any successor corporation which continues the Plan under Section 6.7. The Companies shall act with respect to the Plan through the officers of HUGHES AIRCRAFT COMPANY or their delegates and not through their boards of directors.

Section 1.17 - Company Service

A month of Company Service of an Employee or former Employee means a calendar month of service for a Company which, if performed for HUGHES AIRCRAFT COMPANY, would at the time of performance be treated as a month of company service under Company Practice 3-0-9 as it may be amended from time to time.

Section 1.18 - Compensation

"Compensation" of a Participant for any Plan Year

(a) means his base pay, shift differential pay, Company sick leave pay, payments of state unemployment compensation for disability while receiving Company sick leave pay, payments of workers' compensation for disability while receiving Company sick leave pay, payment for over-time hours, vacation actually taken, holiday, bereavement, personal leave, jury duty or military training pay, sea duty premium, hazard area premium, domestic field allowances, flight pay, compensable travel pay, capture and detention pay, foreign service premiums, working leader bonuses, sales commissions or bonuses, cost of living allowances, amounts paid under the Salary Adjustment Plan and Supplementary Compensation Plan of the Company, and amounts deferred by the Participant which are contributed by the Company under the Hughes Aircraft Company Salaried Employees' Thrift and Savings Plan, but

(b) shall exclude any compensation not paid by a Company, foreign service allowances for post, quarters, education, dual housing, home leave and tax differential, profit-sharing payments, public or private retirement payments, contributions (except Employee contributions) or benefits, retainers, insurance benefits or Company-paid premiums, payments for vacation not taken, and other special payments.

Section 1.19 - Contingent Annuitant

"Contingent Annuitant" means a person properly designated by a Participant or Former Participant to receive Benefits, solely in accordance with Section 4.11, 4.12, 4.17, 6.1 or 6.9, in the event of his death after payment of an annuity hereunder commences.

Section 1.20 - Continuous Service

(a) "Continuous Service" of an Employee means his current period as an Employee of one or more Companies or a member of the Controlled Group in any positions or classifications, but excluding periods of unpaid absence while an Employee, excludible under Company personnel policy consistently applied, and not includible under the terms of any collective bargaining agreement. No such period of unpaid absence, however, shall be considered to be a break in Continuous Service.

(b) Continuous Service shall be broken by a Separation from the Service under which the Employee has no recall rights.

Section 1.21 - Controlled Group

"Controlled Group" means the controlled group of corporations, trades and businesses as determined under regulations issued by the Secretary of the Treasury or his delegate under Sections 414(b) and 414(c) of the Internal Revenue Code (and, for purposes of Section 415 of such Code, under subsection 415(h)) of which the Companies (and by any other company so designated by the Administrator) are members.

Section 1.22 - Early Retirement

"Early Retirement" of a Participant or Former Participant means his retirement upon his Early Retirement Date.

Section 1.23 - Early Retirement Benefit

"Early Retirement Benefit" of a Participant or Former Participant means the Benefit payable to or with respect to him under Section 4.8.

Section 1.24 - Early Retirement Date

"Early Retirement Date" of a Participant or Former Participant means the first day of a month before his Normal Retirement Date so designated under Rules of the Plan by a Participant or Former Participant who at the time of his Separation from the Service has attained his fifty-fifth birthday. Such a Participant who has a Separation from the Service by resignation or discharge may under the Rules of the Plan treat such resignation or discharge as a retirement and may treat the first day of any month following the date of such resignation or discharge as his Early Retirement Date. A Participant or Former Participant who has a Separation from the Service before his fifty-fifth birthday may elect Early Retirement in accordance with Section 4.7, effective on or after his fifty-fifth birthday.

Section 1.25 - Employee

"Employee" means any person who renders services to any Company in the status of any employee as the term is defined in Section 3121(d) of the Internal Revenue Code of 1954 (or its subsequent counterpart).

Section 1.26 - ERISA

"ERISA" means the Employee Retirement Income Security Act of 1974 as it may be amended from time to time.

Section 1.27 - Final Average Monthly Compensation

"Final Average Monthly Compensation" of a Participant means one-twelfth of:

(a) with respect to a Separation from the Service occurring after December 31, 1975 and before July 1, 1978, the amount determined by dividing

(i) his aggregate Compensation attributed to the lesser or

a his last ten qualifying twelve-Accounting Month periods and

b all of his qualifying twelve-Accounting-Month periods,

by

(ii) the number of periods taken into account under paragraph (I), and

(b) with respect to a Separation from the Service occurring after June 30, 1978 and before December 3, 1979, the amount determined by dividing

(i) his aggregate Compensation attributed to the lesser of

a the eight highest of his last ten qualifying twelve-Accounting-Month periods and

b all of his qualifying twelve-Accounting-Month periods,

by

(ii) the number of periods taken into account under paragraph (I), and

(c) with respect to a Separation from the Service occurring on or after December 3, 1979, the amount determined by dividing

(i) his aggregate Compensation attributed to the lesser of

a the five highest of his last ten qualifying twelve-Accounting-Month periods, and

b all of his qualifying twelve-Accounting-Month periods,

by

(ii) the number of periods taken into account under paragraph (I).

(d) For purposes of this Section, a Participant's qualifying twelve-Accounting-Month period is a period beginning after 1965 of twelve consecutive Accounting Months

(i) ending with the end of the last Accounting Month preceding or coinciding with the earlier of

a the date of such Separation from the Service, or

b his Normal Retirement Date

or with the end of that Accounting Month in an earlier year most nearly corresponding with such last Accounting Month, and

(ii) in which twelve-Accounting Month in an earlier year most nearly corresponding with such last Accounting Month, and

(e) For purposes of this Section, the Compensation attributed to a Participant with respect to any qualifying twelve-Accounting-Month period shall be the Compensation earned during such period multiplied by a fraction (not less than unity) the numerator of which shall be the lesser of

(i) two thousand eighty, and

(ii) the number of Hours of Service he would have had during such period had he worked during the entire period at his regularly scheduled number of hours per week,

and the denominator of which shall be equal to the excess of his Hours of Service in such period over his Hours of Service resulting from the payment of vacation not taken in such period.

Section 1.28 - Former Participant

"Former Participant" means a person who has had a Separation from the Service and becomes entitled to Benefits under the Plan.

Section 1.29 - Hours of Service

(a) The "Hours of Service" of an Employee or former Employee means the sum of:

(i) his hours of actual work on the job,

(ii) his periods of vacation, holiday, Military Service, paid sick leave or paid leave of absence, computed on the basis of the number of

hours in his regularly scheduled work day and work week, and

(iii) his period of receipt of

a layoff supplementary pay, converted to Hours of Service on the basis of forty Hours of Service for each week in which he receives any such pay, and

b employer-funded disability pay, converted to Hours of Service on the basis of forty Hours of Service for each week in which he receives any such pay, and for a salaried Employee by dividing his most recent salary by the average number of regularly-scheduled hours of work in his salary period, ignoring holidays, sick leaves and vacations, and

(iv) his hours for which back pay, irrespective of mitigation of damages, is either awarded or agreed to by the Company. In no event shall the same Hours of Service be credited twice under this paragraph and paragraphs (I), (ii, or (iii), and

(v) his Hours of Service with any other employer during which such employer is part of an affiliated service group (under Section 414(m) of the Code) or is a part of a Controlled Group of which the Company is a member.

Section 1.30 - Income Insurance Plan

"Income Insurance Plan" means any Income Insurance Plan of HUGHES AIRCRAFT COMPANY as presently constituted or as it may be amended from time to time, or the corresponding plan of any Company so designated by the Administrator.

Section 1.31 - Insurance Company

"Insurance Company" means any insurance company selected by the Administrator to provide contracts of insurance or annuity contracts for the purpose of funding benefits under the Plan.

Section 1.32 - Late Retirement

"Late Retirement" of a Participant or Former Participant means his retirement upon his Late Retirement Date.

Section 1.33 - Late Retirement Benefit

"Late Retirement Benefit" of a Participant or Former Participant means the Benefit payable under Section 4.10.

Section 1.34 - Late Retirement Date

"Late Retirement Date" of a Participant means the first day of the calendar month coinciding with or next following his Separation from the Service occurring later than his Normal Retirement Date, but in no event later than the date under Section 1.9(d).

Section 1.35 - Military Service

Any Employee who leaves the Controlled Group directly to perform service in the Armed Forces of the United States or the United States Public Health Service under conditions entitling him to reemployment rights as provided in the laws of the United

States, or to perform service in ACTION, shall, solely for purposes of the Plan and irrespective of whether he is compensated by any member of the Controlled Group during such period of service, be an Employee on Military Service, unless such Employee voluntarily resigns from the Controlled Group during such period of service, or he fails to make application for reemployment within the period specified by such laws for the preservation of this reemployment rights, or (in the case of ACTION) within thirty calendar days after his separation therefrom.

Section 1.36 - Normal Retirement

"Normal Retirement" of a Participant or Former Participant means his retirement upon his Normal Retirement Date.

Section 1.37 - Normal Retirement Benefit

"Normal Retirement Benefit" means the Benefit payable under Section 4.2.

Section 1.38 - Normal Retirement Date

"Normal Retirement Date" of a Participant or Former Participant means the first day of the calendar month coincident with or next following his sixty-fifth birthday.

Section 1.39 - Participant

"Participant" means any person included in the Plan as provided in Article II.

Section 1.40 - Participant Contributions

"Participant Contributions" of a Participant means his contributions to the Plan under Section 3.4 of its predecessor.

Section 1.41 - Participant Contribution Account

"Participant Contributions Account" of a Participant means his individual account established in accordance with Section 3.7.

Section 1.42 - Plan

"Plan" means Hughes Non-Bargaining Retirement Plan.

Section 1.43 - Plan Enrolled Actuary

The term "Plan Enrolled Actuary" means that person who is enrolled by the Joint Board for the Enrollment of Actuaries established under Subtitle C of Title III of ERISA and who has been engaged by the Administrator on behalf of all Participants to make and render all necessary actuarial determinations, statements, opinions, assumptions, reports, and valuations under the Plan as required by law or requested by the Administrator.

Section 1.44 - Plan Year

"Plan Year" means the calendar year, including such years preceding the adoption of the Plan.

Section 1.45 - Primary Insurance Amount

The "Primary Insurance Amount" of a Participant means the monthly primary insurance amount of his old age insurance benefit determined as of his Normal Retirement Date under the federal Social Security Act as in effect on the date of his Separation from the Service, whether more or less than the amount which would be payable if such Act remained unamended until that Date and whether or not the Participant actually applies for and receives such amount for any month, by assuming that he will receive Compensation at rates applicable on the date of such Separation from the Service, over a further period of employment

extending to his Normal Retirement Date. The Primary Insurance Amount of a Participant who again becomes a Participant following his Separation from the Service shall in no event exceed the amount which would produce that Normal Retirement Benefit to which such Participant would have been entitled had he not again become an Employee following such Separation from the Service. For any Participant for whom the Primary Insurance Amount cannot be ascertained as herein provided, said amount shall be that amount which the Administrator shall reasonably estimate. The Primary Insurance Amount determined herein for any Participant will be adjusted to reflect the actual salary history for years previously estimated before his Separation from the Service if the Participant supplies documentation of that history. Such documentation must be provided no later than a reasonable period of time following the later of the date of his Separation from the Service and the time the Participant is notified of the Benefit to which he or she is entitled. No Benefit hereunder shall be decreased by reason of any increase in the benefit levels payable under Title II of the Social Security Act or any increase in the wage base under such Title II, if such increase takes place after September 2, 1974, or (if later) the earlier of the dat of first receipt of such Benefits or the date of Separation from the Service of the Participant to whom or with respect to whom such Benefits are paid, as the case may be.

Section 1.46 - Rules of the Plan

"Rules of the Plan" means rules and regulations of interpretation, administration, and application of the Plan, as properly established and consistently applied by the Administrator.

Section 1.47 - Separation from the Service

(a) The term "Separation from the Service" of an Employee means his quit, discharge, layoff (other than

a temporary layoff), Early, Normal or Late Retirement from the Companies, or his death.

(b) A leave of absence, (whether paid or unpaid) authorized by a Company in accordance with established policies, a vacation period, a temporary layoff, acceptance of a position as a Union Officer, Military Service or a transfer among members of the Controlled Group shall not constitute a Separation from the Service; provided, however, that

(i) Continuation upon a temporary layoff for a period in excess of the maximum period for temporary layoffs specified in the then applicable Company practice, shall be considered a layoff effective as of the end of such specified period.

(ii) Failure to return to work upon expiration of any leave of absence, vacation, or temporary layoff shall be considered a quit effective as of the expiration of such leave of absence, vacation, or temporary layoff.

<u>Section 1.48</u> - <u>Total Benefit Accrual Service</u>

"Total Benefit Accrual Service" means, with respect to an Employee, the sum of

(a) his Benefit Accrual Service pursuant to the Hughes Non-Bargaining Retirement Plan

and

(b) his Benefit Accrual Service pursuant to the Hughes Bargaining Retirement Plan.

<u>Section 1.49</u> - <u>Trust</u>

"Trust" means the trust established pursuant to the Trust Agreement.

<u>Section 1.50</u> - <u>Trust Agreement</u>

"Trust Agreement" means that certain Trust Agreement pursuant to Hughes Non-Bargaining Retirement Plan and Hughes Bargaining Retirement Plan, as it may be amended from time to time, providing for the investment and administration of the Trust Fund. By this reference, the Trust Agreement is incorporated herein.

<u>Section 1.51</u> - <u>Trustee</u>

"Trustee" means the Trustee and any successor or substitute trustee under the Trust Agreement.

<u>Section 1.52</u> - <u>Trust Fund</u>

"Trust Fund" means the fund established under the Trust Agreement by contributions made by the Companies and Participants pursuant to the Plan and from which any distributions under the Plan are to be made.

<u>Section 1.53</u> - <u>Union Officer</u>

A "Union Officer" means a Participant who accepts a leave of absence or part-time employment from the Companies to assume a paid position as an officer or business agent of a union which is the collective bargaining representative for a collective bargaining unit consisting of or including Employees, so long as he holds such a position, if he is entitled pursuant to a collective bargaining agreement with a Company to be a Participant while on

such leave of absence or in such part-time employment and has not waived such right.

Section 1.54 - Vested

"Vested" means nonforfeitable except to the extent provided in Sections 4.14 and 4.18.

Section 1.55 - Vested Retirement Benefit

"Vested Retirement Benefit" shall have the meaning given in Section 4.15.

Section 1.56 - Year of Service

"Year of Service" of an Employee means a period of fifty-three weeks (using his regular payroll week) ending with eh week in which his Anniversary Date falls, during which period he completed one thousand or more Hours of Service.

Section 1.57 - Years of Vesting Schedule Service

"Years of Vesting Schedule Service" of a Participant means the greater of

(a) the number of his Years of Service completed after he first became an Employee and while his Company (if other than HUGHES AIRCRAFT COMPANY) was fifty percent or more owned, directly or indirectly, by, or under common control with, HUGHES AIRCRAFT COMPANY, but excluding each ear of Service ending

(i) before 1976 and before or during a break in his Continuous Service commencing before 1976,

(ii) after 1975, before a Break in Service Year, and not followed by any Year of Service after such Break in Service Year, or

(iii) before he has five Years of Vesting Schedule Service (determined without regard to this paragraph (iii) and before the number of consecutive Break in Service Years equals or exceeds five (ignoring for this purpose any Years of Service excluded by virtue of any previous application of this paragraph (iii)); or

(b) one-twelfth (1/12th) of his months of Company Service (rounding down to the next lowest whole number.

ARTICLE II
ELIGIBILITY

Section 2.1 - Requirements for Participation

(a) Effective January 1, 1980 any person who was a Participant in the Hughes Retirement Plan on December 31, 1979 and not employed in a bargaining unit covered by a collective bargaining agreement shall remain a Participant until Section 2.4 or 2.5 applies to him.

(b) Any other Employee who

(i) had not attained the age of sixty-four years and six months on last becoming an Employee, and

(ii) has completed either

a a twelve-month period commencing with

1 his first Hour of Service since the date he was hired as an Employee of his Company (whether or not then a Company), or

2 his Anniversary Date

in which period he had completed one thousand (1,000) or more Hours of Service, or

b twelve months of Company Service, and

(iii) is not an Employee in a bargaining unit covered by a collective bargaining agreement with respect to which retirement benefits were the subject of good faith bargaining (unless such agreement provides for coverage hereunder of Employees in such unit), and

(iv) is not a Sales Representative of Theta Cable of California, and

(v) is on the United States payroll of his Company (as maintained by such Company in accordance with its established practice), and

(vi) complies with the requirements of Section 2.3,

shall become a Participant after 1979, effective as of the first Monday of the calendar month coincident with or next following his satisfaction of such requirements.

(c) Any participant whose participation is terminated by a Separation from the Service under Section 2.4 shall again become a Participant upon again becoming an Employee and complying with the requirements of paragraphs (iii)-vi), inclusive, of subsection (b). There shall be no duplication of any previously Accrued Benefits by reason of a Participant's readmission to the Plan.

Section 2.2 - Notice of Eligibility

The Administrator shall give reasonable advance written notice to the Employees of their prospective eligibility to become Participants.

Section 2.3 - Application to Participants

The Administrator shall furnish each eligible Employee with a form of application for participation in which, as a condition precedent to participation, he shall state:

(a) his request for participation in the Plan;

(b) his name, date of birth, name and date of birth of spouse, and other relevant information;

(c) his consent that he, his Beneficiaries, Contingent Annuitants, successors in interest, and all persons claiming under him, shall be bound by the statements contained therein and the provisions of the Plan as they now exist, and as they may be amended from time to time, to the extent consistent with applicable law, and

(d) his agreement to make Participant Contributions under Section 3.4 in accordance with Section 3.5 and his authorization to his Company to withhold such

amounts from his Compensation and transmit the same to the Trustee in accordance with Sections 3.5 and 3.6.

Section 2.4 - Termination of Participation

A Participant shall cease to be a Participant and shall become entitled to Benefits, if any, in accordance with Article IV, upon his Separation from the Service.

Section 2.5 - Suspension During Continuous Service

A Participant may suspend his participation in the Plan during his Continued Service at any time by giving such advance written notice to the Administrator as is required under the Rules of the Plan that he declines to make contributions under Section 3.4 for a period of twelve calendar months and thereafter until he again complies with Section 2.3, which notice shall be effective and irrevocable in accordance with its terms upon receipt by the Administrator.

Section 2.6 - Forfeitures

If a Participant has a Separation from the Service for any reason prior to his acquisition of a fully Vested Retirement Benefit, the unvested portion of his Accrued Benefit Derived from Company Contributions shall be forfeited at the earliest of

(a) if he then has less than five Years of Vesting Schedule Service, that date when the number of his consecutive Break in Service Years equals five,

(b) if he has then had one or more Break in Service Years not followed by a Year of Service, immediately preceding his sixty-fifth birthday, or

(c) if he then has less than five Years of Vesting Schedule Service, his withdrawal of Participant Contributions under Section 3.8(a) provided that any such unvested portion shall be restored subject to subsequent forfeiture under this Section, if, before subsection (a) applies, he restores such withdrawn Contributions with interest under Section 3.8(b).

Section 2.7 - Inactive Status

(a) A Participant who is transferred directly to a position or classification with the Company which:

(i) fails to meet the requirements of Section 2.1(b)(iv) or (v) shall thereupon become a Participant on inactive status and shall not thereafter make contributions under Article III; or

(ii) fails to meet the requirements of Section 2.1(b)(iii) shall on the first day of the Accounting Month coinciding with or following such transfer become a Participant on inactive status and shall not thereafter make contributions under Article III.

(b) All provisions of the Plan, including Article IV, will continue to apply to a Participant on inactive status.

(c) If a Participant on inactive status is retransferred to a position or classification which:

(i) meets the requirements of Section 2.1(b)(iv) and (v), he shall thereupon be restored to active status and may resume making contributions under Article III, or

(ii) meets the requirements of Section 2.1(b)(iii) he shall on the first day of the Accounting Month

coinciding with or following such transfer be restored to active status and may resume making contributions under Article III.

(15)

No. 97-1287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HUGHES AIRCRAFT COMPANY AND
HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Statutes, Rules, and Regulations:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1287

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

INTRODUCTION

Respondents' argument boils down to the proposition that they own the investment income generated by their contributions to the Hughes plan, and that they are thus entitled to dismantle the plan so that they (and their lawyers) can divide up the alleged surplus. That proposition, embraced by the Ninth Circuit, is wrong. Nothing in ERISA creates any such entitlements. Unless and until Hughes decides to terminate the plan, respondents are entitled to no more and no less than their defined benefits.

What respondents are seeking in this case is a radical transformation of ERISA from a *shield* to protect promised plan benefits into a *sword* to extract surplus plan assets. That

objective is utterly antithetical to the statute's text, structure, and purpose. ERISA protects the long-term stability and security of employee benefit plans by ensuring that sufficient plan assets will be available to pay plan liabilities. If those assets fall below the level needed to fund defined benefits, the employer must make up the difference. If assets grow to exceed that amount, the surplus remains in the plan for future benefit payments. Plan assets, in other words, belong to the plan, not to the employer or to the individual employees who participate in the plan at any given moment in time.

By claiming a personal entitlement to the alleged surplus assets in the Hughes plan, respondents seek to overturn these settled principles. Their claims pose a direct threat to the Hughes plan and to all ERISA-covered plans. It is thus no surprise that those claims are opposed not only by the very employees respondents purport to represent (the longstanding associations of active and retired Hughes employees), but also by all three federal agencies entrusted with administering the statute (the Department of Labor, the Pension Benefit Guaranty Corporation, and the Internal Revenue Service). Because none of respondents' claims is cognizable under ERISA, the judgment should be reversed and the case remanded with instructions to dismiss the complaint.

I. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA'S FIDUCIARY PROVISIONS.

Respondents' three claims challenging Hughes' 1989 and 1991 amendments as violations of ERISA's fiduciary provisions fail as a matter of law because, as this Court has explained, "the act of amending a pension plan does not trigger ERISA's fiduciary provisions." *Lockheed Corp. v. Spink*, 517 U.S. 882, 891 (1996); *see also id.* at 890 ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). Respondents offer three feeble rejoinders: (1) they reiterate the Ninth Circuit's assertion that *Spink* does not apply to plans funded in part by employee contributions, *see*

Resp. Br. 35-37; (2) they contend that the 1991 amendment was a "sham transaction" outside the scope of *Spink*, *see id.* at 13, 16-17; and (3) they attempt to recast their claims as challenges to the "implementation" (rather than adoption) of the 1991 amendment, *see id.* at 13, 17, 32-33. All three arguments are unavailing.

First, ERISA's definition of "fiduciary" provides no basis for a distinction based on the source of plan funding. *See* 29 U.S.C. § 1002(21)(A). That definition specifically encompasses acts of plan "management" and "administration," but is conspicuously silent with respect to acts of plan structure or design. Thus, as the *Spink* Court held, an employer does not act as a fiduciary when amending a plan. *See* 517 U.S. at 890-91.

It makes no difference whether the plan is contributory or non-contributory; as respondents themselves acknowledge, the statute "has one definition of 'fiduciary' for all plans," Resp. Br. 35; *see also* U.S. Br. 26 (noting that the contributory/non-contributory distinction is "irrelevant" in determining whether fiduciary duties are triggered). An employee does not become a plan sponsor or "co-settlor" by virtue of contributing to a plan. *See* U.S. Br. at 28-29. ERISA's fiduciary provisions simply do not limit an employer's discretion to amend a plan. *See, e.g., Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994).

Second, there is no basis for respondents' argument that the 1991 amendment was a "sham transaction" outside the scope of *Spink*. Notwithstanding respondents' use of quotation marks around the word "amendment," *see* Resp. Br. 16, there is no question that the 1991 amendment was in fact an amendment. To amend a plan is simply to "alte[r] the terms of a plan." *Spink*, 517 U.S. at 890. By altering the terms of the plan in 1991 to add the non-contributory benefit structure, Hughes self-evidently amended the plan. Under *Spink*, such a change in plan design is simply not a fiduciary act. *See id.* at 890-91.

Respondents thus frame the issue precisely backwards by asserting that "[s]ham transactions are not sanitized by calling them 'amendments.'" Resp. Br. 13. The point, rather, is that amendments are not subject to fiduciary duties by calling them "sham transactions." The "sham transaction" theory addressed in *Spink* relates to the *content* of ERISA's fiduciary duties, not the antecedent question whether such duties are triggered in the first place. *See* 517 U.S. at 895 & n.8 (discussed *infra* pp. 9-10). Because the act of amending a plan does not *trigger* ERISA's fiduciary provisions, it cannot *violate* those provisions. That does not mean that "'amending' a plan [is] an unreviewable act," Resp. Br. 40, but only that amending a plan is not a fiduciary act. Needless to say, the fact that plan amendments are outside the scope of ERISA's fiduciary provisions does not mean that plan amendments are outside the scope of the statute altogether. Several other provisions, including those relating to anti-inurement, vesting, and minimum funding, restrict the substantive content of plan amendments. *See Spink*, 517 U.S. at 891.

Third, respondents cannot salvage their fiduciary claims by recasting them as challenges to Hughes' "implementation" (rather than adoption) of the 1991 amendment. As an initial matter, respondents waived any such "implementation" claim by failing to raise it below or in opposing the petition for certiorari in this Court. This case has always been about whether the act of *amending the plan* was unlawful. That was certainly the way the District Court interpreted respondents' claims. *See* Pet. App. 58a (rejecting respondents' fiduciary claims on the ground that amending a plan does not trigger fiduciary duties), 60a-61a (same). That was also the way the Ninth Circuit interpreted those claims in the decision now before this Court for review. *See* Pet. App. at 14a-16a (upholding respondents' fiduciary claims on the theory that amending a plan *does* trigger fiduciary duties where employees have contributed to the plan); *id.* at 23a-25a (same). Not surprisingly, that was the premise underlying the challenge to respondents' fiduciary claims in the petition for certiorari. *See*

Pet. i, 10-16 (challenging the notion that ERISA's fiduciary duties are triggered by the act of amending a plan). Respondents accepted that premise in their opposition to the petition, and said nothing to suggest that their fiduciary claims challenged the act of "implementing," as opposed to adopting, the challenged amendments. *See* Pet. Opp. i, 7, 10-22 (defending the Ninth Circuit's holding that the act of amending a plan triggers ERISA's fiduciary duties where employees have contributed to the plan). Accordingly, it is neither necessary nor appropriate for this Court to address respondents' belated "implementation" claim. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956, 965 n.5 (1998); *United States v. Alvarez-Sanchez,* 511 U.S. 350, 360 n.5 (1994); *Schiro v. Farley*, 510 U.S. 222, 228-29 (1994); S. Ct. Rule 15.2.

In any event, that claim fails on the merits for the simple reason that the mere payment of benefits pursuant to a plan is not a fiduciary act. Alleging an act of plan administration (as opposed to plan design) is *necessary* but not *sufficient* to trigger ERISA's fiduciary duties. The statutory definition of "fiduciary" is expressly limited to the exercise of "discretionary" authority in the course of plan administration. 29 U.S.C. § 1002(21)(A); *see also Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 129 (7th Cir. 1992) (Posner, J.) ("ERISA makes the exercise of discretionary authority a *sine qua non* of fiduciary duty."). The mere payment of benefits by a plan administrator pursuant to the plan's terms is not discretionary. *See, e.g., Flacche v. Sun Life Assurance Co.*, 958 F.2d 730, 734 (6th Cir. 1992). Where, as here, such "purely ministerial" tasks are at issue, ERISA's fiduciary provisions are not implicated. 29 C.F.R. § 2509.75-8, D-2; *see also Confer v. Custom Eng. Co.*, 952 F.2d 34, 39 (3d Cir. 1991) ("Since discretionary authority, responsibility or control is a prerequisite to fiduciary status, it follows that persons who

perform purely ministerial tasks, . . . cannot be fiduciaries because they do not have discretionary roles.").[1]

Indeed, acceptance of respondents' "implementation" claim would render *Spink* a dead letter: fiduciary challenges to plan amendments could always be framed as challenges to the "implementation," rather than the adoption, of those amendments. ERISA does not restrict indirectly what it permits directly.[2]

II. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA'S ANTI-INUREMENT PROVISION.

Respondents' claim that Hughes' 1989 and 1991 amendments violated ERISA's anti-inurement provision, 29 U.S.C. § 1103(c)(1), fails as a matter of law because "[a]n employer does not unlawfully use plan assets for its own benefit when it merely provides for the payment of benefits to plan participants." U.S. Br. 11. The anti-inurement provision requires that plan assets "be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. § 1103(c)(1). An amendment that uses plan assets to pay benefits to plan participants does not violate that provision as a matter of law, even if the employer thereby obtains some incidental benefit. *See, e.g., Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995); Pet. Br. 22-23; U.S. Br. 21. Respondents do not contest that fundamental (and dispositive) proposition. Instead, they (1) insist that the 1991 amendment unlawfully used plan assets to pay benefits to participants in a *different* plan, Resp. Br. 14-23; (2) reiterate their conclusory allegation of a "sham transaction," *id.* at 16-17; and (3) assert that Hughes violated an obligation to hold plan assets in trust, *id.* at 25-31. None of these three interrelated arguments has merit.

First, respondents' repeated assertion that the 1991 amendment unlawfully used plan assets to pay a "separate" or "non-plan" corporate debt, *see, e.g.*, Resp. Br. 1, 12, 14, 15, 17, 19, 21, 33, 39, 50, rests entirely on the premise that the contributory and non-contributory benefit structures are two distinct plans. That premise is incorrect. As this Court has emphasized time and again, ERISA grants employers broad discretion over the creation and design of their plans. *See, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997); *Spink*, 517 U.S. at 890; *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). In exercising that discretion, employers are free to include multiple benefit structures in a single plan as long as "all the assets under the plan remain available to pay benefits to all of the participants and beneficiaries under the plan." U.S. Br. 19

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[1] In a similar vein, one of respondents' *amici* claims that Hughes violated ERISA's fiduciary provisions by amending the conditions for participation in the plan and then paying benefits pursuant to the amended definition. *See* Brief *Amicus Curiae* of the National Employment Lawyers Association 9-11. This claim was never alleged by respondents or addressed by the courts below, and thus is not properly before this Court. *See, e.g., Reno v. Koray*, 515 U.S. 50, 55 n.2 (1995). In any event, the claim is meritless. There is no basis for distinguishing amendments to the conditions for participation in a plan from other amendments. As noted in text, the mere payment of benefits pursuant to the terms of an amended plan is not a fiduciary act.

[2] Respondents also allude in passing to yet another claim that has never before surfaced in this case—a claim that Hughes as plan administrator "lied" to plan participants about the non-contributory benefit structure and thereby violated its fiduciary duties. Resp. Br. 33. This new claim, which represents an unsubtle attempt to mimic *Varity Corp. v. Howe*, 516 U.S. 489 (1996), also has been waived. In any event, respondents have not even alleged that any ostensible misstatement was material or induced reliance. "There is . . . a world of difference between the employer's deliberate misleading of employees in *Varity Corp.* and [an alleged] failure to begin every communication to plan participants with a caveat." *Sprague v. General Motors Corp.*, 133 F.3d 388, 405 (6th Cir.), *cert. denied*, 118 S. Ct. 2312 (1998); *see also Frahm v. Equitable Life Assurance Soc.*, 137 F.3d 955, 960 (7th Cir. 1998) ("[C]laims that one or another bit of advice was misleading do not violate this statute."), *petition for cert. filed*, 66 U.S.L.W. 3783 (U.S. May 27, 1998) (No. 97-1915).

(citing, *inter alia*, 26 C.F.R. § 1.414(*l*)-1(b)(1); 29 C.F.R. § 2520.102-4); *see also* Pet. Br. 27-28.

Respondents' emphasis on the differences between the contributory and non-contributory benefit structures in the Hughes plan, *see* Resp. Br. 4-7, is therefore misplaced. Respondents do not dispute that both benefit structures draw upon a single pool of assets. That point alone disposes of their allegation of separate plans. As the United States—on behalf of all three federal agencies entrusted with administering ERISA—explains, the differences between the two benefit structures in the Hughes plan are irrelevant as a matter of law.[3] As long as "all of the assets of the amended plan are available to pay benefits to participants under both benefit structures," the Hughes plan is "a single plan under ERISA." U.S. Br. 19, 18.[4]

Respondents' argument to the contrary rests entirely on a line of cases addressing the question whether a particular promise of benefits is sufficiently definite to qualify as an ERISA-covered plan in the first instance. *See, e.g.*, Resp. Br.

[3] That conclusion is not altered by the fact (which respondents repeat *ad nauseam*) that Hughes' Director of Human Resources in 1990 sent employees a letter referring to the non-contributory benefit structure as "a new retirement plan." J.A. 198 (quoted at Resp. Br. 3-4, 5, 8, 14, 17, 19, 20, 21, 23). That letter was drafted in colloquial terms for workers, not in legalese for lawyers. *Cf. Librizzi v. Children's Mem. Med. Ctr.*, 134 F.3d 1302, 1305 (7th Cir. 1998) ("[C]omplex plans are hard to explain in a few words."). The letter is thus wholly irrelevant to the legal question whether the new contributory benefit structure is a new plan within the meaning of ERISA. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 278-80 (1978) (emphasizing that a term may have different meanings in different contexts).

[4] Respondents cite a Department of Labor opinion letter for the proposition that "'whether there is a single plan or multiple plans is an inherently factual question.'" Resp. Br. 21 (quoting Opinion No. 96-16A, 1996 WL 491410 (Aug. 27, 1996)). That letter, however, addressed an unfunded welfare plan for which "all benefits are paid out of the general assets of the Company," 1996 WL 491410, at *2, not a pension plan with a separate pool of assets. By definition, the "single pool of assets" test was inapplicable there.

19-20 (citing, *inter alia*, *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982)). Those cases stand only for the proposition that "a 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing and procedures for receiving benefits." *Donovan*, 688 F.2d at 1373 (quoting the statutory definition of "employee welfare benefit plan," 29 U.S.C. § 1002(1)). That proposition is wholly irrelevant here, as there is no dispute that the Hughes plan is an ERISA-covered plan. The question whether an ERISA-covered plan exists at all is obviously different from the question whether the creation of a new benefit structure within such a plan can be characterized as the creation of a new plan. Indeed, those two questions are governed by entirely different regulations. *Compare* 29 C.F.R. § 2510.3 (listing factors relevant to the inquiry whether an ERISA-covered "plan" has been created) *with* 29 C.F.R. § 2520.102-4 (stating that "an employee benefit plan may provide different benefits for various classes of participants and beneficiaries").[5]

Second, the 1991 amendment cannot remotely be characterized as a "sham transaction," Resp. Br. 16-17, to give rise to a legally cognizable anti-inurement claim. This Court observed in *Spink* that an employer's discretion over "the payment of benefits pursuant to an amended plan" might be constrained "[i]f the benefits payment were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme."

[5] Even if the non-contributory benefit structure were indeed a separate plan, nothing in ERISA would authorize respondents to challenge a transfer of all or part of the surplus from the original plan to the new plan. *See* Pet. Br. 26 n.3, 29 n.6. Respondents' observation that I.R.C. § 414(*l*) limits an employer's discretion in this regard, *see* Resp. Br. 23, misses the point because that provision is part of the Internal Revenue Code, not ERISA. It goes without saying that private parties, like respondents, have no private right of action to enforce the tax code. *See, e.g.*, *Trenton v. Scott Paper Co.*, 832 F.2d 806, 810 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988).

517 U.S. at 894-95 & n.8. That observation is irrelevant here, as the 1991 amendment of the Hughes plan did not "disguise" anything. It did precisely what it purported to do: it established a new non-contributory pension benefit structure for future employees and those current employees who elected to participate in the new structure. There is nothing shady or underhanded about the creation of such a benefit structure; it is a perfectly legitimate (and common) means of providing retirement benefits.

Thus, as the United States explains, the 1991 amendment cannot be characterized as a "sham transaction" because it "provides real benefits to real participants." U.S. Br. 24-25 n.14; *see also* Pet. App. 45a n.12 (Norris, J., dissenting) (noting that respondents "merely allege 'sham' in a conclusory fashion"). Respondents' open-ended approach to the "sham transaction" concept (endorsed by the panel majority below, *see* Pet. App. 24a) would render *Spink* a dead letter by transforming a narrow exception into the general rule.

Third, respondents' lengthy discussion of the relationship between ERISA's anti-inurement provision and traditional trust principles, *see* Resp. Br. 25-31, is wholly beside the point. The trust principles invoked by respondents add nothing to what the anti-inurement provision states on its face—that the assets of a defined benefit plan must be used for the exclusive benefit of plan participants. That is precisely what happened here: Hughes used plan assets to pay benefits to plan participants. Whether Hughes thereby received any incidental benefits "is of no moment." *Fletcher v. Kroger Co.*, 942 F.2d 1137, 1140 (7th Cir. 1991); Pet. Br. 22-23. "[A]mong the 'incidental' *and thus legitimate* benefits that a plan sponsor may receive from the operation of a pension plan are attracting and retaining employees, paying deferred compensation, . . . providing increased compensation without increasing wages, [and] increasing employee turnover." *Spink*, 517 U.S. at 893 (emphasis added); *see also* U.S. Br. 23 ("[T]here is no reason why an employer may not . . . benefit by amending the plan to

provide for the use of surplus assets to create a new benefit structure for current and new employees.").

Respondents' contrary argument is based entirely on the suggestion that Hughes engaged in "indiscriminate" use of plan assets for its own benefit. Resp. Br. 39; *see also id.* at 7 (asserting that this case is "just as if the [plan] had paid Hughes' wage, debt service or electric bills"). That suggestion is false—every penny at issue here went to pay benefits to plan participants. It is simply not true that Hughes "siphoned off" any plan assets to pay its own bills. Resp. Br. 47. Respondents are thus tilting at windmills. The relevant question is whether ERISA's anti-inurement provision limits an employer's discretion to amend a plan to provide new benefits for plan participants. The answer to that question (which respondents do not even dispute) is plainly no.[6]

III. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA's VESTING AND NONFORFEITURE PROVISION.

Respondents have all but abandoned their claim that the 1989 and 1991 amendments violated ERISA's vesting and

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[6] Respondents' passing suggestion (in a footnote) that "[t]he petition for certiorari did not appear to challenge [the Ninth Circuit's anti-inurement] holding," Resp. Br. 32 n.19, is baseless. The third question presented in the petition specifically challenged whether plan participants "have a legally-cognizable property interest not only in their defined benefits but also in the assets held by the plan." Pet. i. As the petition pointed out, all of respondents' claims ultimately rest on "the erroneous premise that respondents have a property interest not only in their defined benefits under the Plan, but also in the assets held by the Plan." *Id.* at 16. Because that premise is incorrect, petitioners "could not possibly have violated ERISA's fiduciary, *anti-inurement*, vesting, or other provisions." *Id.* at 18 (emphasis added); *see also id.* at 3 (noting that "*all* of respondents' claims" are based on this erroneous premise) (emphasis added). Because the petition clearly challenged "all of respondents' claims," all of those claims (which were passed on below and have been fully briefed by both the parties and *amici*) are properly before this Court. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

nonforfeiture provision, 29 U.S.C. § 1053. Rather than defending the Ninth Circuit's holding that "employees are vested in their own contributions *and the income generated therefrom*," Pet. App. 21a (emphasis added), respondents now concede that plan participants are vested only in their "contributions *plus an imputed rate of interest*," Resp. Br. 48-49 (emphasis added). Accordingly, it is now undisputed that respondents have no vested and nonforfeitable right to the actual investment returns attributable to their contributions to the Hughes plan. *See* Pet. Br. 30-32; U.S. Br. 20 ("[E]mployees in an ongoing defined benefit plan do not have vested rights in the 'income' generated by their own mandatory contributions"). Because respondents' claim under § 1053 is premised entirely on the existence of such a right, *see* J.A. 27-28, 242, that claim is legally baseless.[7]

Instead of surrendering their vesting claim outright, respondents attempt to recast it as a minimum-funding claim. *See* Resp. Br. 49 ("Petitioners admit that § 1053 might be breached 'by depleting plan assets that are needed' for nonforfeitable accrued benefits. That is precisely what plaintiffs allege.") (citing Pet. Br. 32). Respondents, however, have never alleged that the plan's use of surplus assets threatens its ability to pay vested benefits. To the contrary, their complaint specifically alleges that "the assets of the Plan are substantially *in excess* of those required to fund all current and future pensions." J.A. 26, 241 (emphasis added); *see also*

[7] Respondents nonetheless claim that they have vested rights in the income generated by their contributions to the plan *after* the 1991 amendment. *See* Resp. Br. 21-22, 49 n.27 (citing 29 U.S.C. § 1054(c)(4)). This is yet another claim that has never been asserted at any prior stage of this litigation, and has thus been waived. In any event, the claim is baseless. The provision cited by respondents applies only to *voluntary* contributions to "a defined benefit plan which permits voluntary employee contributions." 29 U.S.C. § 1054(c)(4), Pet. App. 84a. The Hughes plan, however, does not authorize voluntary contributions, and respondents' contributions are mandatory. *See* J.A. 108, 134 (stating that participants in the contributory structure "shall" contribute 3% of their salaries).

id. at 25, 240 (alleging that the plan "accumulated a substantial *overfunding*") (emphasis added). That excess more than satisfies ERISA's minimum funding provisions, which require only that plan assets equal accrued benefits. *See* 29 U.S.C. § 1082; Pet. Br. 32. Respondents' newly minted minimum-funding claim thus fares no better than their discredited vesting claim.

The failure of respondents' vesting claim dooms all of their claims. This entire case is ultimately premised on the notion that each participant in the Hughes plan is entitled to the income generated by his own contributions. Because no such entitlement exists, that notion is baseless. Indeed, that notion is inconsistent with the very concept of a defined benefit plan. Such a plan pools all assets, and uses that pool to pay benefits to all participants. As respondents themselves explain, the "[a]ssets of defined benefit plans are held for participants as a group." Resp. Br. 25. Unless and until a defined benefit plan is terminated, its assets must remain in the plan to satisfy current and future liabilities. Pooling assets and liabilities in this manner spreads risks over time, and thereby helps to ensure that all participants receive their defined benefits. As long as any given participant receives his defined benefits out of plan assets, he has no right to complain that others do as well.

IV. RESPONDENTS HAVE NOT STATED A COGNIZABLE CLAIM UNDER ERISA'S ASSET-DISTRIBUTION PROVISION.

Respondents' claim that Hughes violated ERISA's asset-distribution provision, 29 U.S.C. § 1344, fails as a matter of law because Hughes never terminated the plan and hence that provision was never triggered. Section 1344, by its terms, applies only "[i]n the case of the termination of a single-employer plan." 29 U.S.C. § 1344(a), Pet. App. 121a. Respondents now concede that the Hughes plan (from which they continue to receive benefits) has never been terminated; they argue instead that Hughes "should have" terminated the

plan in 1991, Resp. Br. 12, 15, and should be "order[ed]" to do so now, *id.* at iii, 13, 48. That argument makes no sense. Where, as here, there has been no termination, by definition there has been no violation of the provision governing the distribution of plan assets after termination. Respondents' concession on termination, in other words, forecloses their claim under § 1344.

Respondents' current position on termination represents a stark about-face. The complaint alleges that "the Plan was terminated on January 1, 1991," the effective date of the amendment adding the non-contributory benefit structure. J.A. 20. The fourth cause of action, which asserts a violation of § 1344, is premised on that allegation. *See id.* at 29. The District Court rejected the allegation and claim, holding that the "[c]reation of a new benefit structure does not terminate a plan," and that "plan terminations must be accomplished pursuant to the rules specified in 29 U.S.C. § 1341, and there is no allegation by plaintiffs that such a procedure has been instituted." *Id.* at 59a. The Ninth Circuit, in contrast, accepted the allegation and claim, asserting that a factual question existed about whether Hughes terminated the plan in 1991 and thereafter violated § 1344 by failing to distribute plan assets. *Id.* at 22a-23a; *see also id.* at 10a-11a & n.3. When respondents subsequently amended their complaint, they reiterated their allegation that "the Plan was terminated on January 1, 1991." J.A. 234-35; *see also id.* at 243 (alleging that Hughes violated § 1344 by failing to distribute plan assets after terminating the plan "effective January 1, 1991").

The most obvious flaw in respondents' original termination theory (embraced by the Ninth Circuit) is that ERISA's intricate framework governing plan termination has never even been invoked, much less satisfied, with respect to the Hughes plan. Notwithstanding the Ninth Circuit's assertion (deleted in response to the petition for rehearing) that "ERISA does not define when a termination occurs," Pet. App. 11a n.3, an entire title of the statute is devoted to precisely that subject. Indeed,

Title IV of ERISA sets forth the "*[e]xclusive* means of plan termination," 29 U.S.C. § 1341(a)(1) (emphasis added), and it is a cumbersome process, *see, e.g., In re Pension Plan for Employees of Broadway Maintenance Corp.*, 707 F.2d 647, 649 (2d Cir. 1983). ERISA provides for no such thing as a "constructive" termination—either there is an actual termination pursuant to the terms of the statute or there is not. The United States, representing the views of the PBGC and other agencies, agrees that the Hughes plan was not terminated in 1991 as a matter of law. *See* U.S. Br. 12-13 & n.2.

Confronted with this straightforward proposition, respondents have abandoned their original theory (and the holding below) and now concede that Title IV's "exclusive means of plan termination" never have been followed, and accordingly that the Hughes plan never has been terminated. *See* Resp. Br. 13, 40-42; *see also id.* at 9 (acknowledging that "Title IV sets forth the 'exclusive means,' 29 U.S.C. § 1341(a)(1), for pension plan termination"). Rather than arguing that the plan terminated in 1991, respondents now argue that the plan should be terminated at some point in the future as a result of this litigation. As they put it, "[t]he issue for this Court is not whether a plan can only be terminated through Title IV means, which no one denies, but whether a court can order an unwilling employer to use those procedures." *Id.* at 41.

That shift in position is fatal to respondents' § 1344 claim. That provision governs the distribution of plan assets *after* a termination, and thus cannot be violated unless and until a termination has occurred. Because the Hughes plan has never been terminated (as respondents now concede), there has been no violation of the asset-distribution requirements of § 1344, and respondents' fourth cause of action fails as a matter of law.

Rather than pursuing their § 1344 claim based on the notion that Hughes terminated the plan in 1991, respondents now argue that the Hughes plan should be terminated in the future because it is a "wasting trust" that Hughes has a duty to

terminate under ERISA. *See* Resp. Br. 41-43. This alleged "duty to terminate" comes out of thin air. It is not pleaded in the complaint, was not addressed by the courts below, and has no basis in the statute.

To the contrary, ERISA operates on the basic premise that employers have broad discretion over the adoption, modification, and termination of employee benefit plans. *See supra* p. 7; *see also* U.S. Br. at 17-18. Title IV provides two—and only two—means of plan termination: (1) voluntary termination by the employer, *see* 29 U.S.C. § 1341, Pet. App. 100a-114a; and (2) involuntary termination by the PBGC when a plan is underfunded or benefits are otherwise in jeopardy, *see* 29 U.S.C. § 1342, Pet. App. 114a-121a. *See, e.g., PBGC v. LTV Corp.*, 496 U.S. 633, 638-39 (1990). There is nothing in the statute requiring an employer to terminate an adequately funded plan.

Respondents insist that the narrow scope of involuntary termination under ERISA creates a statutory gap that can be filled by recourse to the common law. *See* Resp. Br. 41, 44-48. There is no such gap. Title IV is comprehensive and, by its terms, "exclusive." 29 U.S.C. § 1341(a)(1). An entire federal agency, the PBGC, exists to administer its provisions. The statute carefully circumscribes the PBGC's authority to order an involuntary termination to situations involving underfunded plans. Needless to say, it would make no sense to construe the statute to leave the field wide open for courts to order involuntary termination of underfunded plans (much less adequately funded plans) outside this statutory framework. As the United States explains, "allowing a common law doctrine to 'deem' a plan terminated . . . would undermine the certainty created by the Act and would jeopardize the orderly administration of plan terminations." U.S. Br. 14. ERISA, in short, leaves no room for courts to resort to the common law to force employers to terminate fully funded plans against their will. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251,

259 (1993); *cf. Dooley v. Korean Air Lines Co.*, 118 S. Ct. 1890, 1895 (1998).[8]

In any event, respondents' characterization of the Hughes plan as a common-law "wasting trust" is fanciful. They insist that they can prove to an "actuarial certainty" that the plan's assets will invariably exceed its liabilities. Resp. Br. 8, 10, 14, 15, 44. Any such "certainty," however, is illusory—not only because the plan's assets and liabilities fluctuate constantly, but also because Hughes could amend the plan at any time (and thus could, for example, allow new enrollment in the contributory benefit structure).

Moreover, there is no principle of trust law providing that a trust must be terminated whenever it is clear that its assets will invariably exceed its liabilities. The termination of a trust at common law is governed by the settlor's intent. *See, e.g.,* George G. Bogert & George T. Bogert, *Trusts & Trustees* § 996, at 257-58 (rev. 2d ed. 1983). A "wasting trust" is nothing more than a trust the material purposes of which have been fulfilled, and the continuation of which would thus frustrate the settlor's intent. *See id.* § 1007, at 395-97; *see also* Resp. Br. 10 (noting that a "wasting trust" results "if a trust's assets will not be used for their intended purposes"); *id.* at 15 (same). Where, as here, it is clear that the material purposes of a trust have not yet been fulfilled, and the settlor actively opposes termination, there is no "wasting trust" under the common law. *See* Pet. Br. 41 n.9; U.S. Br. 16-18.

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[8] Respondents' reliance on cases enforcing an employer's *contractual* promise to terminate a plan is misplaced. *See* Resp. Br. 41-42. Nothing in ERISA prevents an employer from "contractually ced[ing] its freedom" over plan termination. *Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997). Contrary to respondents' assertion that there is "little difference" between application of the common law of contracts and the common law of trusts in this context, Resp. Br. 41; *see also id.* at 14, there is vast and obvious difference: contract law simply enforces duties voluntarily undertaken by the employer, whereas trust law would impose new substantive duties. *See, e.g., American Airlines, Inc. v. Wolens*, 513 U.S. 219, 232-33 (1995).

In the face of these authorities, respondents retreat from their emphasis on the common law and insist that ERISA sought to "modify traditional trust law's emphasis on settlor instructions when this did not adequately protect the interest of plan participants." Resp. Br. 48 (internal quotation omitted). The argument thus comes around full circle: respondents insist that a gap in ERISA must be filled by the common law, but then (when the common law fails to support them) insist that the common law must be overridden by ERISA. What respondents seek to apply, in the final analysis, is a common law of ERISA based on nebulous policies and purposes. In applying that common law, moreover, they would ignore the views of the federal agencies entrusted with administering the statute. The only governing principle, apparently, is that plaintiffs always win. This Court, however, has soundly rejected such a result-oriented approach. *See Mertens*, 508 U.S. at 261-63.

Underlying all of respondents' arguments is the suggestion that Hughes pulled a fast one by refusing to terminate its plan. That suggestion is baseless. It is true that plan participants have a post-termination interest in the assets of a plan to which they have contributed. *See* 29 U.S.C. § 1344. Prior to termination, however, an employer remains free to use plan assets to meet plan liabilities. Under no circumstances can respondents invoke their post-termination interest in the plan assets to force a termination in the first place. The argument that Hughes' refusal to terminate the plan has deprived respondents of money that is rightfully theirs is thus hopelessly circular, as respondents have no right to the plan's assets prior to termination. *See* Pet. Br. 43. Their only right is to their defined benefits, which they are concededly receiving.[9]

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[9] The circularity of respondents' claims is especially evident in their fall-back contention that, in lieu of termination, a court could order "an improvement in benefits so [the] surplus can be used." Resp. Br. 47. That "remedy" would expressly grant respondents what their "duty to terminate" claim implicitly seeks: the right to parlay their post-termination right to (continued...)

CONCLUSION

The Hughes plan is everything a pension plan should be: a financially sound source of benefits for past, current, and future plan participants. The existence of a surplus in such a plan is to be welcomed, not condemned. ERISA neither requires nor permits the involuntary termination of an adequately funded plan. Respondents are receiving their defined benefits; everything is working as planned. Just as in the fable, however, respondents and their lawyers cannot resist the temptation to kill the goose to lay their hands on the golden egg. The threat they pose to the stability and security of all pension plans is obvious, and explains why their efforts are opposed not only by the associations of current and former Hughes employees, but also by all three federal agencies entrusted with administering ERISA.

This lawsuit has now dragged on for more than six years. That is already far too long to leave the pension benefits of Hughes employees in legal limbo. This Court should end this lawsuit for once and for all. Accordingly, the Ninth Circuit's judgment should be reversed, and the case remanded with instructions to dismiss the complaint.

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[9] (...continued)
surplus assets into a pre-termination right to more than their defined benefits. Respondents have no such right.

Respectfully submitted,

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September 16, 1998

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No. 97-1287

In the Supreme Court of the United States

OCTOBER TERM, 1998

HUGHES AIRCRAFT COMPANY, ET AL.,
PETITIONERS

v.

STANLEY I. JACOBSON, ET AL.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

The pension plan in this case is a single-employer, defined benefit pension plan that is subject to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301-1461. Until 1991, the plan's benefit structure was funded by contributions from both the plan sponsor and plan participants. The plan was amended as of January 1, 1991, to create a second benefit structure without participant contributions. The questions presented are:

1. Whether the plan has been or could be terminated under 29 U.S.C 1341, and plan assets distributed under 29 U.S.C. 1344(d).

2. Whether the plan amendment violates the vesting provisions of 29 U.S.C. 1053 and 1054, or the anti-inurement provision of 29 U.S.C. 1103(c)(1).

3. Whether an employer violates the fiduciary provisions of 29 U.S.C. 1104 and 1106 when it amends a plan funded in part by employee contributions.

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INTEREST OF THE UNITED STATES

The Pension Benefit Guaranty Corporation (PBGC) is responsible for interpreting and enforcing the plan termination provisions of Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301-1461. The Secretary of Labor is responsible for interpreting and enforcing the anti-inurement and fiduciary obligation provisions in Title I of ERISA, 29 U.S.C. 1103-1106. The Secretary of the Treasury is responsible for interpreting the vesting provisions in Title I of ERISA, 29 U.S.C. 1053 and 1054, see Reorg. Plan No. 4 of 1978, § 101(a), 92 Stat. 3790, and for interpreting and enforcing the provisions of Title II of ERISA relating to the qualification of pension plans for favorable tax treatment, see 26 U.S.C. 401-424.

STATEMENT

1. a. Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to provide certain minimum standards to assure the equitable character and financial soundness of employee pension benefit plans, which are generally defined as plans providing retirement income to employees. 29 U.S.C. 1001(c), 1002(2). A "defined benefit" pension plan, "as its name implies, is one where the employee, upon retirement, is entitled to a fixed periodic payment" according to the terms set forth in the plan. *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152, 154 (1993); accord *PBGC* v. *LTV Corp.*, 496 U.S. 633, 637 n.1 (1990); *Mead Corp.* v. *Tilley*, 490 U.S. 714, 717 (1989); *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 363-364 n.5 (1980); 29 U.S.C. 1002(35). "Contributions to a defined benefit plan are calculated on the basis of a number of actuarial assumptions about such things as employee turnover, mortality rates, compensation increases, and the rate of return on invested plan assets." *Mead Corp.*, 490 U.S. at 717.

Defined benefit plans may be funded by employer or employee contributions. 29 U.S.C. 1053, 1054. The employer, however, bears the risk of any funding deficiency in the event the plan's actuarial assumptions prove incorrect. See Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 125 (6th ed. 1989). To increase the likelihood that pension funds are available to pay benefits when due, defined benefit plans are subject to minimum funding requirements. 29 U.S.C. 1081(a), 1082; 26 U.S.C. 412. If a defined benefit plan terminates without sufficient assets to pay its pension obligations, however, Title IV of ERISA, 29 U.S.C. 1301-1461, provides a mandatory termination insurance program under which the Pension Benefit Guaranty Corporation (PBGC) pays nonforfeitable plan benefits, subject to certain statutory limitations. *LTV Corp.*, 496 U.S. at 637-638; *Nachman*, 446 U.S. at 375.

ERISA distinguishes a defined benefit plan from a "defined contribution" or "individual account" plan. 29 U.S.C. 1002(34) and (35); see also *Concrete Pipe and Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 607 (1993). Unlike a defined benefit plan, which provides employees with a defined periodic payment upon retirement regardless of the performance of the plan's assets, a defined contribution or individual account plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. 1002(34); see *Keystone*, 508 U.S. at 154; *LTV Corp.*, 496 U.S. at 637 n.1; *Nachman*, 446 U.S. at 364 n.5. Because employees covered by defined contribution plans "are promised only that they will receive the balances in their individual accounts," Title IV's termination insurance program does not apply to such plans. *LTV Corp.*, 496 U.S. at 637 n.1.

b. ERISA also regulates the accrual and vesting of pension benefits. Accrual refers to the manner in which an employee earns increased benefits over time. 29 U.S.C. 1002(23) and (29). Vesting refers to the method by which benefits become nonforfeitable. 29 U.S.C. 1002(19) and (25). Under Section 203(a) of ERISA, all pension plans must provide that an employee's right to his "normal retirement benefit" is nonforfeitable upon the attainment of "normal retirement age." 29 U.S.C. 1053(a); see also 29 U.S.C. 1002(22) and (24) (defining "normal retirement benefit" and "normal retirement age"). Additionally, all pension plans must provide that an employee's rights in the "accrued benefit" derived from his own contributions are nonforfeitable and that, after a certain number of years of service, an employee has a nonforfeitable right to the "accrued benefit" derived from employer contributions. 29 U.S.C. 1053(a)(1) and (2). Similarly, plan amendments generally

may not decrease a participant's accrued benefits. 29 U.S.C. 1054(g)(1).

In a defined contribution plan, an employee's "accrued benefit" means "the balance of the individual's account." 29 U.S.C. 1002(23)(B); see also 29 U.S.C. 1002(34). By contrast, in a defined benefit plan, an employee's nonforfeitable right to his or her accrued benefit does not depend on the plan's actual investment experience. Thus, the term "accrued benefit" in a defined benefit plan means "the individual's accrued benefit *determined under the plan*, * * * expressed in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. 1002(23)(A) (emphasis added). The "accrued benefit" derived from an employee's mandatory contributions, however, must, at a minimum, equal "the employee's accumulated contributions expressed as an annual benefit commencing at normal retirement age, using an interest rate [specified under 29 U.S.C. 1055(g) (3)]." 29 U.S.C. 1054(c)(2)(B); see also 29 U.S.C. 1002(23), 1054(c)(2)(C). Accordingly, a defined benefit plan participant has a nonforfeitable right to the greater of (1) the benefits provided under the plan or (2) an amount derived from the employee's accumulated contributions, determined using an interest rate fixed by the Act.

c. Pension plan assets must generally be held in trust. 29 U.S.C. 1103(a). Except in limited circumstances (including the distribution of residual plan assets upon plan termination),

> the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

29 U.S.C. 1103(c)(1); see also 26 U.S.C. 401(a)(2) (plan is qualified for tax purposes only if "under the trust instrument it is impossible * * * for any part of the corpus or income to be * * * used for, or diverted to, purposes other than for the exclusive benefit of * * * employees or their beneficiaries").

Section 3(21)(A) of ERISA generally provides that a person is a fiduciary with respect to a pension plan

> to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. 1002(21)(A); see also 29 C.F.R. 2509.75-5, 2509.75-8. ERISA's fiduciary duty provisions require fiduciaries to discharge their duties under a plan solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable administrative expenses. 29 U.S.C. 1104(a)(1)(A). Among other things, fiduciaries are prohibited from engaging in certain transactions, 29 U.S.C. 1106, 1108, and must discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter [establishing minimum standards] and subchapter III of this chapter [governing plan terminations]." 29 U.S.C. 1104(a)(1)(D).

d. Title IV of ERISA sets forth the rules governing termination of defined benefit plans covered by Title IV, 29 U.S.C. 1321, and provides that those rules are the "*[e]xclusive* means of plan termination." 29 U.S.C. 1341(a)(1) (emphasis added); see also 62 Fed. Reg. 60,424, 60,428 (Nov. 7, 1997) (to be codified at 29 C.F.R. 4041.1). Under 29 U.S.C. 1342, the PBGC may initiate an involuntary termination of a covered plan under the specific statutory criteria set forth in 29 U.S.C. 1342(a). Such a

plan may be voluntarily terminated "only in a standard termination * * * or a distress termination." 29 U.S.C. 1341(a)(1). See *LTV Corp.*, 496 U.S. at 638-639.

A standard termination applies when a plan has sufficient assets to pay all benefit liabilities, 29 U.S.C. 1341(b), and a distress termination generally applies to underfunded plans and requires the employer to demonstrate to the PBGC severe economic distress, 29 U.S.C. 1341(c). In both instances, the Act sets forth detailed termination procedures, including a requirement that the plan administrator provide to all affected parties at least 60 days' written notice of the administrator's intent to terminate the plan and the proposed date of termination. 29 U.S.C. 1341(a); see also 62 Fed. Reg. at 60,431, 60,436 (to be codified 29 C.F.R. 4041.23, 4041.41(a)(1)) (notice of intent must be issued "at least 60 days and not more than 90 days before the proposed termination date"). The Act also provides that the plan's "termination date" is, in the case of a standard termination, the date proposed in the administrator's notice of intent or, in the case of a distress termination, the date agreed to by the PBGC and the plan administrator. 29 U.S.C. 1348(a)(1) and (2).[1]

Section 4044 of Title IV governs the allocation of plan assets "[i]n the case of the termination of a single-employer plan." 29 U.S.C. 1344(a); 29 C.F.R. 4044.1. Upon termination, the plan administrator must allocate plan assets among plan participants and beneficiaries in a prescribed order that gives priority first to nonforfeitable plan benefits guaranteed by the PBGC, 29 U.S.C. 1344(a)(1)-(4); then "to all other nonforfeitable benefits under the plan," 29 U.S.C. 1344(a)(5); and finally "to all other benefits under the plan," 29 U.S.C. 1344(a)(6). See *Mead Corp.*, 490 U.S. at 717-718.

[1] The date of plan termination ceases participants' benefit accruals and vesting rights, and fixes the liabilities of the PBGC and employers under Title IV. 29 U.S.C. 1322, 1362(a) and (b); see *LTV Corp.*, 496 U.S. at 638.

Section 4044(d) further provides that, "if any assets of the plan attributable to employee contributions remain after satisfaction of all liabilities described in [29 U.S.C. 1344(a)], such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries." 29 U.S.C. 1344(d)(3)(A); see also 29 U.S.C. 1344(d)(3)(B) (prescribing formula for determining the portion of remaining assets that are attributable to employee contributions). After that equitable distribution, "any residual assets * * * may be distributed to the employer if—(A) all liabilities of the plan to participants and their beneficiaries have been satisfied, (B) the distribution does not contravene any provision of law, and (C) the plan provides for such a distribution." 29 U.S.C. 1344(d)(1).

2. Petitioner Hughes Nonbargaining Retirement Plan (the plan) is a tax-qualified defined benefit plan established by petitioner Hughes Aircraft Company (Hughes), Pet. App. 134a, and is governed by the provisions of Title IV of ERISA, 29 U.S.C. 1321. Respondents are five retiree participants in the plan. Pet. App. 133a. The plan is funded by both mandatory employee contributions and employer contributions. *Id.* at 2a, 135a. By 1986, the plan had generated over a billion dollar funding "surplus," defined as the amount of plan assets that exceeds the actuarial present value of accrued benefits. *Id.* at 2a, 136a. In 1987, Hughes stopped contributing to the plan, but required employees to continue making contributions. *Id.* at 137a. In 1989, Hughes amended the plan to offer an early retirement program to certain active employees. *Id.* at 3a. Hughes again amended the plan in 1990, effective January 1, 1991, to freeze enrollment (but not accruals) in the existing contributory benefit structure. That amendment also provided that new employees, and then-current employees who so elected, would be covered by a new benefit structure that required no employee contributions but offered lower benefits. *Id.* at 3a, 138a.

In January 1992, respondents filed a class action against petitioners, contending that the 1991 amendment unlawfully permitted the use of surplus plan assets attributable to employee contributions to fund the new non-contributory benefit structure, and that the 1991 amendment terminated the plan as of the amendment's effective date. The complaint alleged that the 1991 amendment violated the anti-inurement provision in Section 403(c)(1) of ERISA, 29 U.S.C. 1103(c)(1) (count 1); the exclusive purpose requirement of Section 404(a)(1), 29 U.S.C. 1104(a)(1) (count 2); the vesting and nonforfeitability provisions of Sections 203 and 204, 29 U.S.C. 1053, 1054 (count 3); the rules in Section 4044(d), 29 U.S.C. 1344(d), requiring equitable distribution of residual plan assets upon termination (count 4); and the fiduciary rules in Sections 404 and 406, 29 U.S.C. 1104, 1106 (count 5). Pet. App. 139a-142a. The complaint further alleged that the 1989 amendment violated Section 404(a)(1)(D)'s requirement that a fiduciary follow plan documents, 29 U.S.C. 1104(a)(1)(D) (count 6). Pet. App. 142a-143a; see also Br. in Opp. 5. Respondents sought various forms of relief, including an equitable distribution of surplus plan assets "in the form of improved benefits," and an injunction prohibiting Hughes from using plan assets to pay benefits under the non-contributory benefit structure. Pet. App. 143a.

3. The district court dismissed all counts of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim. Pet. App. 53a-62a. The court found that respondents had not alleged that the plan failed to provide any benefits due under the plan, or that the plan lacked sufficient assets to pay all accrued benefits. *Id.* at 54a-55a. The court also rejected respondents' claim that the plan was effectively terminated by the January 1, 1991, amendment creating a non-contributory benefit structure. *Id.* at 59a. The court reasoned that "[c]reation of a new benefits schedule or structure does not terminate a plan," and that respondents had failed to allege that Hughes instituted any of the mandatory termination procedures under 29 U.S.C. 1341. Pet. App. 59a. The court further observed that respondents' termination claim "overlooks the fact that thousands of participants, including thousands of active employees, have elected to remain under the contributory benefits structure and are continuing to receive benefits thereunder." *Ibid.* Finally, the court held that respondents had not stated valid claims under ERISA's anti-inurement, fiduciary duty, and vesting provisions. *Id.* at 55a-61a.

4. A divided panel of the court of appeals reversed. Pet. App. 1a-48a. The court of appeals held that each count of the complaint stated cognizable claims under ERISA by alleging that Hughes used surplus plan assets that were attributable to employee contributions for Hughes' own benefit and for the benefit of employees accruing benefits under the non-contributory benefit structure. *Id.* at 5a, 27a.

The court of appeals recognized that this Court held in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), that an employer does not act as a fiduciary under ERISA when it amends a pension plan to alter benefits, and that using plan assets to fund an early retirement program for plan participants does not constitute a prohibited transaction under 29 U.S.C. 1104(a)(1)(D). Pet. App. 7a. The court of appeals concluded, however, that *Spink* did not govern this case, because the Hughes plan is partly funded by *employee* contributions, whereas the plan at issue in *Spink* was funded solely by *employer* contributions. *Id.* at 7a-8a, 14a, 16a. The court of appeals therefore concluded that, "when an employer amends a plan to use for its own benefit an asset surplus attributable in part to employee contributions, the employer is wearing both its 'fiduciary' and its 'employer' hats." *Id.* at 15a.

The court of appeals also reasoned that whether the January 1, 1991, plan amendment terminated the plan depended on the factual question whether the plan had been converted to a common law "wasting trust" whose purposes have been accomplished. Pet. App. 10a-12a & n.3. If

respondents could prove a termination under that common law doctrine, the court of appeals explained, they were entitled to an equitable distribution of the surplus plan assets attributable to their contributions under 29 U.S.C. 1344(d), and Hughes had violated ERISA's anti-inurement and fiduciary duty provisions by using plan assets for purposes other than paying benefits to participants in the allegedly terminated contributory plan. Pet. App. 10a-13a, 17a-18a, 22a-25a. The court of appeals further held that, by using plan assets attributable in part to employee contributions to fund the non-contributory benefit structure, Hughes violated a vested right of the employees to the surplus "income" generated by their contributions. *Id.* at 18a, 21a.

Judge Norris dissented, concluding that the complaint was properly dismissed in its entirety. Pet. App. 27a-48a.

SUMMARY OF ARGUMENT

A. Respondents have not stated a valid claim that Hughes terminated its plan when it amended the plan to create a new non-contributory benefit structure. Respondents have not alleged that Hughes complied with the provisions in Title IV that set forth the exclusive means by which a plan may be terminated. 29 U.S.C. 1341, 1342. Because the plan has not been terminated under Title IV, respondents have no right to an equitable distribution of the plan's surplus assets under 29 U.S.C. 1344.

The 1991 amendment also did not convert the Hughes plan into a common law "wasting trust." Even assuming that theory may form the basis of an action by participants to force an employer to initiate the termination of a defined benefit plan under Title IV of ERISA, the Hughes plan is not a wasting trust because its purposes have not been accomplished. Plan participants continue to accrue benefits under the plan, and the purposes of the trust therefore continue to be served. Similarly, the Hughes plan is a single plan under ERISA, because the 1991 amendment on its face did not create two distinct plans, and it is undisputed that all assets under the plan are

available to pay benefits under both the contributory and non-contributory benefit structures.

B. Respondents also have not stated a valid claim that Hughes violated ERISA's vesting provisions, 29 U.S.C. 1053, 1054. Those provisions prohibit forfeiture of the accrued benefits specified in the plan. Respondents are receiving those benefits. They are not entitled under ERISA's vesting provisions to additional benefits on account of the plan's earnings.

Nor have respondents stated a viable claim that Hughes, by using plan assets to provide new non-contributory benefits, violated ERISA's anti-inurement provision, 29 U.S.C. 1103(c)(1). An employer does not unlawfully use plan assets for its own benefit when it merely provides for the payment of benefits to plan participants. That conclusion is not altered by the fact that the plan has surplus assets partly due to employee contributions, or by the fact that the employer incidentally benefits from the payment of pension benefits under its plan.

C. The court of appeals also should have dismissed the claim that Hughes violated ERISA's fiduciary duty provisions, 29 U.S.C. 1104, 1106, when Hughes amended its plan in 1989 to create an early retirement program and in 1991 to create a non-contributory benefit structure. This Court held in *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 891 (1996), that "the act of amending a pension plan does not trigger ERISA's fiduciary provisions," because the employer acts as a settlor, not as a fiduciary, with respect to matters of plan design. That reasoning applies regardless of whether the plan provides for employee contributions.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE COMPLAINT STATES VALID CAUSES OF ACTION UNDER ERISA

The court of appeals seriously misconstrued the provisions of Titles I and IV of the Employee Retirement Income Security Act of 1974 (ERISA) in allowing this case

to proceed. The court fundamentally erred in concluding that the 1991 plan amendment adopting a non-contributory benefit structure may amount to a termination of the plan under ERISA, and that respondents are entitled to surplus plan assets in a defined benefit pension plan before the plan has been terminated pursuant to Title IV. Those errors led the court of appeals to conclude that respondents stated a claim for a distribution of assets under 29 U.S.C. 1344, and significantly influenced the court's decision concerning respondents' causes of action under ERISA's anti-inurement and fiduciary duty provisions. See Pet. App. 10a-13a, 16a, 23a. We first discuss the court's errors concerning plan termination; we then turn to why the 1991 plan amendment is consistent with ERISA's vesting and anti-inurement provisions; and finally we address why respondents do not state a valid claim that Hughes violated ERISA's fiduciary provisions.

A. THE 1991 AMENDMENT DID NOT AMOUNT TO A PLAN TERMINATION TRIGGERING A DISTRIBUTION OF PLAN ASSETS

1. Respondents allege that Hughes terminated the plan on January 1, 1991, when it froze new participation in the contributory structure and created a non-contributory structure providing for a different level of benefits. Pet. App. 132a, 134a, 141a. That allegation, however, does not state a valid claim for distribution of assets under Section 4044.

An employer may terminate a single-employer defined benefit pension plan covered by Title IV of ERISA only through the "standard" termination or "distress" termination procedures set forth in Title IV. 29 U.S.C. 1341. Those statutory methods are the "*exclusive* means of [employer-initiated] plan termination." 29 U.S.C. 1341(a)(1) (emphasis added); see also 62 Fed. Reg. at 60,428 (to be codified at 29 C.F.R. 4041.1) (statute's requirements set forth the "exclusive means of voluntarily terminating a plan"); 52 Fed. Reg. 33,318 (1987) (expressing PBGC's view that, "[a]bsent qualifying for [a standard or distress] termination, a single-employer plan cannot voluntarily terminate").[2] It is undisputed that Hughes has never initiated the notification and other requirements to terminate the plan under 29 U.S.C. 1341. See Pet. App. 59a. Therefore, as a matter of law, the plan has not terminated under ERISA.

It ineluctably follows from the above conclusion that respondents have no claim under Section 4044(d) to an equitable distribution of surplus assets attributable to their contributions. Section 4044 permits a distribution to participants and beneficiaries *only* "[i]n the case of the termination of a single-employer plan." 29 U.S.C. 1344(a); see also 29 C.F.R. 4044.1 (Section 4044 "contains rules for allocating a plan's assets when the plan terminates"); Pet. App. 34a (Norris, J., dissenting) ("[i]f the Plan is terminated, then 4044(d) of ERISA * * * kicks in and requires an equitable distribution of the Plan assets"). Accordingly, because the plan has not terminated, the provisions in 29 U.S.C. 1344(d) do not provide for a distribution of plan assets. See *Brillinger* v. *General Elec. Co.*, 130 F.3d 61, 63-64 (2d Cir. 1997), petition for cert. pending, No. 97-1834; *Malia* v. *General Elec. Co.*, 23 F.3d 828, 831-832 (3d Cir.), cert. denied, 513 U.S. 956 (1994); cf. *Mead Corp.*, 490 U.S. at 723 (Section 4044 is a "distribution mechanism and not a source for new entitlements").[3]

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[2] Courts of appeals, other than the court below, have recognized that Title IV's termination provisions set forth the sole means by which a defined benefit plan covered by Title IV may terminate. See, *e.g.*, *American Flint Glass Workers Union* v. *Beaumont Glass Co.*, 62 F.3d 574, 579 (3d Cir. 1995); *PBGC* v. *Pritchard*, 50 F.3d 315, 316 (5th Cir. 1995); *Phillips* v. *Bebber*, 914 F.2d 31, 34 (4th Cir. 1990).

[3] Even if petitioner had initiated a standard termination under 29 U.S.C. 1341(b), Section 4044(d) would not require a distribution of surplus assets until all the plan's liabilities had been satisfied. 29 U.S.C. 1344(d)(3)(A). Moreover, because "pension funding on a termination basis is subject to actuarial assumptions that differ from those used to calculate funding on an on-going basis[,] * * * a pension plan that is adequately funded on an on-going basis can be substantially underfunded on a termination basis." *American Flint Glass Workers Union*, 62 F.3d at 577 n.4. See also PBGC Amicus Br. Supporting Pet. 14-15 n.10

In holding that respondents have stated a valid claim to receive an equitable share of the plan's surplus assets, the court of appeals reasoned that respondents, "after discovery" and possibly through "the help of experts," may be able to prove that the plan "constructive[ly] terminated" in 1991 by becoming a wasting trust under common law principles. Pet. App. 11a n.3. At common law, the court of appeals explained, "once the object of the settlor had been achieved, the trust was deemed to end since its continuation would be useless and might frustrate the intent of the settlor as to a beneficiary or remainder interest." *Ibid.* (internal brackets omitted) (quoting *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1202 (S.D. Tex. 1991), aff'd on other grounds *sub nom. Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995)).

That common law doctrine, however, cannot override Title IV's "[e]xclusive" procedures setting forth the means by which a plan may terminate. 29 U.S.C. 1341(a). See *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 259 (1993) ("The authority of courts to develop a 'federal common law' under ERISA is not the authority to revise the text of the statute.") (citations omitted). Indeed, allowing a common law doctrine to "deem" a plan terminated for purposes of Section 4044(d) would undermine the certainty created by the Act and would jeopardize the orderly administration of plan terminations. The court of appeals therefore erred in concluding that a plan may terminate absent strict compliance with Title IV's termination provisions.[4]

(discussing why court of appeals' approach would be "impossible to administer").

[4] The court of appeals also relied (Pet. App. 11a n.3) on 26 C.F.R. 1.401-6(b)(1), which states that "[w]hether a plan is terminated is generally a question to be determined with regard to all the facts and circumstances in a particular case." That regulation, however, does not apply to plans covered by Title IV of ERISA. Indeed, the Department of Treasury's regulations and rulings expressly recognize that a Title IV plan may not be terminated unless the termination complies with the procedures set forth in 29 U.S.C. 1341 or 1342. 26 C.F.R. 1.411(d)-2(c)(2); Rev. Rul. 89-87, 1989-2 C.B. 81 ("a single-employer plan to

2. Respondents also argue (Br. in Opp. 6-7, 25-29) that, under the common law theory of wasting trust, a court should order Hughes to terminate its plan under the procedures set forth in 29 U.S.C. 1341. That contention, however, is inconsistent with respondents' complaint, which alleges that the plan in fact terminated on January 1, 1991. Pet. App. 132a, 134a, 141a; see also J.A. 234-235, 237, 243 (first amended complaint). Moreover, under 29 U.S.C. 1348(a)(1), the plan termination date in a standard termination is the date proposed in the plan administrator's notice of intent, which must be provided to affected parties "[n]ot less than 60 days *before* the proposed termination date." 29 U.S.C. 1341(a)(2) (emphasis added). Thus, a plan may not be retroactively terminated in a standard termination under Title IV.

Nor have respondents alleged a viable claim that a court may order the termination of the Hughes plan on a future date on the ground that the plan is a wasting trust. As an initial matter, Title IV does not grant participants a right of action to force a plan termination. Cf. 29 U.S.C. 1370 (permitting suit to enjoin or redress a "violation" of certain provisions in Title IV). Furthermore, it is unclear whether, in light of Title IV's comprehensive provisions, any other provision of law would permit a plan participant to sue a plan sponsor to terminate a plan under Title IV based on a common law theory of a wasting trust.[5]

which Title IV [of ERISA] applies that has not been terminated under Title IV, even though its assets have been distributed, will not have terminated for purposes of the Code").

[5] We are aware of no court of appeals decision to consider the issue. Cf. *American Flint Glass Workers Union*, 62 F.3d at 580-581 (reversing summary judgment because union alleged that settlement agreement required employer to supply additional funding needed for plan to terminate under Title IV); *Phillips* v. *Bebber*, 914 F.2d 31, 34 (4th Cir. 1990) (ordering plan termination in conformity with Title IV when plan documents provided for termination upon occurrence of certain events); *In re Gulf Pension*, 764 F. Supp. at 1201-1205 (holding that two defined benefit plans in which enrollments froze and contributions ceased in 1970 were wasting trusts whose continuation would frustrate

This Court need not decide, however, whether (and, if so, under what circumstances) a plan participant may force an employer to initiate the procedures under 29 U.S.C. 1341 to terminate a defined benefit pension plan covered by Title IV under a wasting trust theory, because there is no basis for applying such a theory in this case. Under common law, a wasting trust is a trust whose purposes have been accomplished, such that the continuation of the trust would frustrate the settlor's intent. Pet. App. 11a n.3; see generally Austin W. Scott & William F. Fratcher, *The Law of Trusts* §§ 334, 337, 337.8 (4th ed. 1989); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* §§ 1002, 1007 (rev. 2d ed. 1983); Restatement of Trusts (Second) § 337(2) (1959). The Hughes plan does not fall within that definition, because its purposes have not yet been accomplished.

Hughes created its plan to provide deferred compensation to its employees in the form of pension benefits. See J.A. 61 (stating purposes of Plan "[t]o stimulate and maintain among eligible employees of the Companies, a sense of responsibility, cooperative effort and a sincere interest in the progress and success of the Companies," and "[t]o increase the efficiency of such Employees and to encourage them to remain with the Companies until retirement from active service"); see generally 29 U.S.C. 1002(2)(A) (pension plans provide employees with retirement and deferred income). Here, although the 1991 amendment froze new enrollment in the contributory benefit structure, the plan has thousands of active participants who are continuing to accrue benefits under that structure. J.A. 174 (Garrison Supp. Decl. ¶ 3) (in 1991, "more than 39,000 were active

settlor's intent, even though 2,900 active employees continued to accrue benefits under plans). Different considerations may apply to defined contribution plans, which are not subject to Title IV. 29 U.S.C. 1321(b)(1). See *Chambers* v. *Kaleidoscope, Inc. Profit Sharing Plan & Trust*, 650 F. Supp. 359, 373-375 (N.D. Ga. 1986) (directing termination of defined contribution plan that had been abandoned by plan sponsor after sponsor filed bankruptcy petition and ceased to conduct business).

employees * * * accruing benefits under the contributory benefits structure of the Plan"); see also Pet. App. 59a, 146a. Furthermore, all eligible employees hired by Hughes after 1991 are accruing benefits under the plan's non-contributory benefit structure. *Id.* at 3a, 146a. Thus, the 1991 amendment had no effect on the plan's purpose to provide pension benefits to eligible employees.

On the other hand, if the plan were to terminate, all benefit accruals under the plan would cease. See *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1172-1173 (11th Cir. 1988) (en banc); note 1, *supra*. Thus, far from effectuating the settlor's intent, a termination would frustrate the plan's express purpose to retain active employees through the accrual of benefits. Accordingly, there is no basis for concluding that a court could order a termination of the Hughes plan under respondents' theory that the 1991 amendment converted the Hughes plan into a wasting trust whose purposes have been accomplished.[6]

Finally, application of a wasting trust theory would be inappropriate in light of Hughes' manifest objection to the termination of its financially solvent, ongoing plan.[7] ERISA generally recognizes that employers have discretion to terminate employee pension or welfare benefit plans. *Spink*, 517 U.S. at 890; *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995); *Inter-Modal Rail Employees Ass'n* v. *Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997). Thus, the decision whether to terminate

[6] In light of the objection to the termination by many plan participants, see Hughes Aircraft Retirees Ass'n and Hughes Employees Ass'n Amicus Br. Supporting Pet. 2-3, respondents could not meet the additional common law requirement that all beneficiaries of the wasting trust consent to its termination. See Scott & Fratcher, *supra*, §§ 334, 337; Bogert & Bogert, *supra*, §§ 996, 1002, 1007; Restatement of Trusts (Second), *supra*, §§ 337(1), 340(2).

[7] Cf. 29 U.S.C. 1342(a) (authorizing involuntary termination proceedings brought by PBGC when, *inter alia*, "the plan has not met the minimum funding standard under [26 U.S.C. 412]" or "the plan will be unable to pay benefits when due").

a pension plan is not a fiduciary act. *American Glass Workers Union*, 62 F.3d at 579; see also DOL Advisory Op. No. 97-03A, at 3-4 (Jan. 23, 1997) ("'settlor' functions include decisions relating to the establishment, design and termination of plans and, except in the context of multiemployer plans, generally are not fiduciary activities subject to Title I of ERISA"); accord DOL Info. Ltr. No. 03131986 (Mar. 13, 1986). A forced termination in this case would be inconsistent with those principles and would undermine one of ERISA's stated purposes: "to encourage the maintenance and growth of single-employer, defined benefit pension plans" that provide "retirement income security [to] millions of workers." 29 U.S.C. 1001b(a)(2), 1001b(c)(2); see also 29 U.S.C. 1302(a)(1).

3. There also is no basis for respondents' additional contention that the Hughes' plan has become a wasting trust because the 1991 amendment created two separate pension plans, a "Contributory Plan" and a "Non-Contributory Plan" providing different level of benefits. Br. in Opp. 2-6. Both the contributory and non-contributory benefit structures are part of a single plan under ERISA. On its face, the 1991 amendment did not create a new plan. Instead, the amendment altered an existing plan to create a new benefit structure that applies to participants hired after the effective date of the amendment and to previously hired participants who elected to switch from the pre-existing contributory benefit structure. J.A. 34 (Verhey Decl. ¶¶ 4-5), 159-172 (amendment to Plan adding non-contributory benefit structure).

Respondents mistakenly contend that the contributory and non-contributory benefit structures constitute different plans because they share "virtually no characteristics." Br. in Opp. 4 (quoting Pet. App. 3a). "Nothing in ERISA prohibits two different benefit structures from being funded from one source." Pet. App. 45a (Norris, J., dissenting). Department of Labor regulations specifically recognize that "an employee benefit plan may provide different benefits for various classes of participants and beneficiaries." 29 C.F.R. 2520.102-4.

A plan amendment that creates a new benefit structure does not create a new plan under ERISA if, after the amendment, all the assets under the plan remain available to pay benefits to all of the participants and beneficiaries under the plan. See, *e.g.*, 26 C.F.R. 1.414(*l*)-1(b)(1) (for purposes of plan mergers, consolidations, and transfers of plan assets, "[a] plan is a 'single plan' if and only if, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries. * * * A plan will not fail to be a single plan merely because * * * [t]he plan has several distinct benefit structures which apply either to the same or different participants."); accord Rev. Rul. 81-137, 1981-1 C.B. 232; DOL Advisory Op. No. 81-41A (Apr. 6, 1981).[8] There is no dispute here that all of the assets of the amended plan are available to pay benefits to participants under both benefit structures. Accordingly, the 1991 amendment did not create two separate plans under ERISA.[9]

B. THE 1991 AMENDMENT DID NOT VIOLATE ERISA'S VESTING OR ANTI-INUREMENT PROVISIONS

1. As retiree participants in a defined benefit pension plan, respondents have vested rights to receive an "accrued benefit," 29 U.S.C. 1053(a), which is defined as the "benefit determined under the plan," generally "expressed

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[8] In certain circumstances, a plan may be tested for compliance with the nondiscrimination requirements in 26 U.S.C. 401(a)(4) and 410(b) as if there were two or more distinct plans. See 26 C.F.R. 1.401(a)(4)-9(c), 1.401(a)(4)-12, 1.410(b)-(7)(c)(1) and (4); see T.D. 8485, 1993-2 C.B. 126, 129; T.D. 8363, 1991-2 C.B. 287, 306; T.D. 8360, 1991-2 C.B. 98, 104. Those testing provisions are not relevant to the issues presented in this case.

[9] Even were respondents correct that there is a distinct contributory "plan," that plan would not be a wasting trust because its purposes plainly continue to be furthered by the accrual of benefits for thousands of participants under that "plan." See p. 16, *supra*.

in the form of an annual benefit commencing at normal retirement age." 29 U.S.C. 1002(23)(A). Respondents do not dispute that they are receiving their accrued benefits determined under the plan. Pet. App. 54a-55a. Nor do respondents allege that they are receiving benefits less than the statutory minimum prescribed by 29 U.S.C. 1054(c)(2)(B) for benefits derived from an employee's accumulated mandatory contributions. See p. 4, *supra*. Respondents therefore have not stated a valid claim that the 1991 amendment violated ERISA's vesting provisions under 29 U.S.C. 1053 and 1054.

The court of appeals' contrary conclusion is based on the view that "if employees' own contributions *and the income their contributions generate* exceed the defined benefit amount under the plan, ERISA requires that employees be paid the larger amount." Pet. App. 18a (emphasis added); see also *id.* at 21a ("[b]y statutory definition, employees are vested in their own contributions *and the income generated therefrom*") (emphasis added). The Act, however, does not support that conclusion.

Unlike a defined contribution plan, see pp. 3-4, *supra*, employees in an ongoing defined benefit plan do not have vested rights in the "income" generated by their own mandatory contributions. Such employees have a nonforfeitable right only in the greater of the benefits determined under the plan or a benefit attributable to their accumulated mandatory contributions plus a statutory rate of interest. 29 U.S.C. 1002(23), 1053(a), 1054(c)(2)(B). Any assets in excess of those needed to provide those nonforfeitable benefits remain assets of the plan to which individual employees have no rights under 29 U.S.C. 1053. See *Brillinger* v. *General Elec. Co.*, 130 F.3d at 64 ("Participants in a defined benefit plan are not entitled to increases in benefits because successful investment causes assets to grow to be greater than liabilities."); *Johnson* v. *Georgia-Pacific Corp.*, 19 F.3d 1184, 1189 (7th Cir. 1994) ("A defined-benefit plan gives current and former employees property interests in their pension benefits but not in the

assets held by the trust."); accord *Malia* v. *General Elec. Co.*, 23 F.3d at 830 n.2, 831-832.

2. Respondents also have failed to state a valid cause of action under the anti-inurement provision of Section 403(c)(1). That Section, which is not restricted to fiduciary acts (see Pet. App. 8a), provides in relevant part that "the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. 1103(c)(1). When an employer distributes plan assets in the form of benefit payments to eligible participants and beneficiaries, the plan's assets are paid in accordance with the express terms of Section 403(c)(1) and do not unlawfully "inure to the benefit" of the employer.[10] Thus, Hughes' amendment of the plan to provide for the use of its assets to pay benefits under the non-contributory benefit structure does not violate Section 403(c)(1). See Pet. App. 33a (Norris, J., dissenting) ("In essence, [respondents] are * * * claiming that [petitioner] somehow violated § 403(c)(1) when it used Plan funds to pay benefits to Plan participants.").

In ruling to the contrary, the court of appeals relied on the fact that the plan's surplus assets were partly funded by employee contributions. Pet. App. 8a-10a. Section 403(c)(1) prohibits inurement of plan assets, however, without regard to their source. The focus is on the use of plan assets.[11] If assets are used for impermissible pur-

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[10] Courts of appeals have consistently so held. See *Spink* v. *Lockheed Corp.*, 125 F.3d 1257, 1261 (9th Cir. 1997); *Maez* v. *Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1506 (10th Cir. 1995); *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 592 n.6 (11th Cir. 1992), cert. denied, 516 U.S. 1009 (1995); *Fletcher* v. *Kroger Co.*, 942 F.2d 1137, 1140 (7th Cir. 1991); *Hlinka* v. *Bethlehem Steel Corp.*, 863 F.2d 279, 283-284 (3d Cir. 1988).

[11] For example, an employer violates Section 403(c)(1) if it withdraws assets from the plan for non-trust purposes. See, *e.g.*, *Amato* v. *Western Union Int'l, Inc.*, 773 F.2d 1402, 1414 (2d Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986); DOL Advisory No. Op. 97-03A, at 3-4 (Jan.

poses, it is no defense for an employer to argue that some of the assets were derived from the employer's own contributions. If assets are used for permissible purposes (*i.e.*, to pay benefits to eligible participants), those payments are not transformed into an impermissible inurement to the employer just because some of the underlying contributions were made by employees.

The court of appeals similarly reasoned that, in amending the plan to create a non-contributory benefit structure, "Hughes has taken advantage of the plan's asset surplus for its own benefit" by "reduc[ing] its labor costs while effectively increasing new employees' wages." Pet. App. 6a. That reasoning, however, ignores the fact that "a defined benefit plan containing residual assets by its nature benefits an employer." *Malia*, 23 F.3d at 831 n.2; see also *Brillinger*, 130 F.3d at 62 ("if the investment of plan assets [in a defined benefit plan] is successful and produces a surplus, the employer benefits"). For instance, "any excess in assets resulting from superior plan asset performance typically accrues to the employer's benefit by reducing the out-of-pocket contribution the employer must make to maintain required funding levels for the present value of the defined benefits." *Malia*, 23 F.3d at 831 n.2. Indeed, even the decision below acknowledges that an employer does not violate Section 403(c)(1) by suspending contributions to an overfunded plan. Pet. App. 6a; cf. 26 U.S.C. 404(a)(1)(A) (generally limiting tax deduction to the amount of employer's contribution not in excess of the full funding limit) and 4972 (imposing 10% tax on excess employer contributions).[12]

23, 1997). Similarly, an unlawful inurement may occur if an employer uses plan assets for purposes other than the payment of benefits, such as pledging plan assets as collateral for a loan.

[12] Moreover, subject to the vesting and accrual requirements in 29 U.S.C. 1053 and 1054, the amount of benefits an employee ultimately receives under a defined benefit plan will not correlate exactly with the amount of the employee's contributions. For example, when a plan is established, it may give credit for "past service" of employees, that is, years of service for which no contributions were made. Such unfunded liabilities have to be amortized and may be paid through contributions made by the employer or by employees working in future years. See 29 U.S.C. 1082(b)(2). Additionally, where benefits are based on an employee's final salary, an employer may "use" a plan surplus to give current employees a benefit increase simply by increasing their wages. Furthermore, an employer's current funding obligations may be reduced if employees leave work before they obtain vested rights in accrued benefits under Section 1053.

If an employer permissibly may benefit from an overfunded plan by ceasing contributions and leaving benefit levels constant, there is no reason why an employer may not similarly benefit by amending the plan to provide for the use of surplus assets to create a new benefit structure for current and new employees. See *Johnson*, 19 F.3d at 1190 ("Pensions are deferred compensation; just as the employer may raise the wages of current employees without owing anything to retirees, so it may raise the pensions of current employees without owing anything to persons who found satisfactory the combination of current and deferred pay offered during their years of service."). For those reasons, the existence of a surplus has no bearing on whether an employer violates Section 403(c)(1) by using plan assets to pay benefits. See also Pet. App. 32a-33a (Norris, J., dissenting) ("It is inconceivable that Congress intended the lawfulness of a plan amendment to turn on whether a 'surplus' existed at the time of the amendment. Whether or not a surplus existed is logically irrelevant to the question whether the 1991 amendment adding a non-contributory benefit structure violated ERISA's anti-inurement provision.").[13]

[13] The fact that an employer benefits when a defined benefit plan is overfunded, however, does not mean that defined benefit plans are invariably advantageous to employers. Because benefit levels are fixed by the plan, employers must compensate for any funding deficiency whenever the investment performance of plan assets does not meet actuarial assumptions. Pet. App. 32a (Norris, J., dissenting) ("The existence of a 'surplus' in a pension fund is nothing more than an actuarial artifact. * * * At all times, whether the fund's investment portfolio is prospering or heading south, Hughes' obligation to assure the financial

The above conclusion is strongly supported by this Court's decision in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996). In addition to holding that ERISA's fiduciary provisions do not apply to the act of amending a plan to create early retirement programs, see pp. 25-26, *infra*, *Spink* also concluded that implementation of such a plan amendment does not violate Section 406(a)(1)(D) of ERISA. 517 U.S. at 892-895. Section 406(a)(1)(D) is similar to Section 403(c)(1)'s anti-inurement provision in that it prohibits a fiduciary from engaging in any transaction that is a direct or indirect "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. 1106(a)(1)(D). Despite Section 406(a)(1)(D)'s broad language, the Court held "that the payment of benefits pursuant to an amended plan, regardless of what the plan requires of the employee in return for those benefits, does not constitute a prohibited transaction." 517 U.S. at 895.

The Court in *Spink* reasoned that Section 406(a)(1)(D) "does not in direct terms include the payment of benefits by a plan administrator," and that the payment of benefits is not the kind of "transaction" that Congress sought to prohibit in Section 406(a). 517 U.S. at 892, 893. The Court further explained that obtaining an employee's release of claims against the employer in exchange for the payment of early retirement benefits is functionally equivalent to many "'incidental' and thus legitimate benefits that a plan sponsor may receive from the operation of a pension plan," such as "attracting and retaining employees, paying deferred compensation, settling or avoiding strikes, providing increased compensation without increasing wages, increasing employee turnover, and reducing the likelihood of lawsuits by encouraging employees who would otherwise have been laid off to depart voluntarily." *Id.* at 893-894.[14]

health of the Plan remains constant."); see also *Brillinger*, 130 F.3d at 62; *Malia*, 23 F.3d at 831 n.2; *Johnson*, 19 F.3d at 1186.

[14] This Court recognized that a "different question" might be presented if benefit payments "were merely a sham transaction, meant to disguise an otherwise unlawful transfer of assets to a party in interest, or involved a kickback scheme." 517 U.S. at 895 n.8. The allegations in this case, however, do not fall within that exception. The 1991 amendment does not disguise any illegal payment. Instead, it provides real benefits to real participants and does not reduce respondents' non-forfeitable benefits. Respondents' contrary contention (Br. in Opp. 7-8, 12-13; Pet. App. 24a-25a) simply restates the fatally flawed claim that the 1991 amendment terminated the Hughes plan and thereby violated ERISA's vesting, termination, and fiduciary provisions. See pp. 12-14, 19-21, *supra*, and pp. 25-29, *infra*.

As in *Spink*, there is no way to differentiate the incidental gains that Hughes receives from the payment of benefits from other legitimate advantages realized by employers when they make benefit payments.

C. HUGHES WAS NOT ACTING AS A FIDUCIARY WHEN IT AMENDED ITS PLAN

1. In *Spink*, this Court held that "[p]lan sponsors who alter the terms of a plan do not fall into the category of fiduciaries." 517 U.S. at 890. The Court therefore rejected the contention that an employer violates the fiduciary provisions in Sections 404(a) and 406(a) when the employer amends its defined benefit pension plan to create early retirement programs that are payable out of surplus assets of the plan. The Court observed that ERISA defines a "fiduciary" to include a person who engages in specified activities with respect to the plan, including "any discretionary authority or * * * control respecting management of such plan or * * * authority or control respecting management or disposition of its assets * * * or * * * any discretionary authority or * * * responsibility in the administration of such plan." 517 U.S. at 889 n.2 (quoting 29 U.S.C. 1002(21)(A)). Because those defined functions do not include matters of plan design, the Court reasoned, "the act of amending a pension plan does not trigger ERISA's fiduciary provisions." *Id.* at 891. The Court's decision in *Spink* accordingly forecloses respondents' contention that Hughes violated the fiduciary pro-

visions of 29 U.S.C. 1104 and 1106 when it adopted the 1989 and 1991 amendments.[15]

The court of appeals attempted to distinguish *Spink* on the ground that *Spink* sanctioned the use of surplus plan assets to pay new benefits when the plan is funded solely by the employer, but did not address a plan in which the surplus was funded in part by *employee* contributions. Pet. App. 14a-15a. That distinction, however, is irrelevant.

Although the plan in *Spink* was non-contributory, see *Spink* v. *Lockheed Corp.*, 125 F.3d 1257, 1261 (9th Cir. 1997), that fact played no part in the Court's analysis. Instead, the Court reasoned that ERISA defines a fiduciary in terms of the nature of the function performed, and that an employer functions as a plan sponsor or settlor, not as a fiduciary, when it amends a plan. See 517 U.S. at 890-891. The nature of that action does not depend on whether a plan is funded by employee or employer contributions, or whether the plan contains an actuarial surplus at any given time. See, *e.g.*, *Johnson*, 19 F.3d at 1188; *Malia*, 23 F.3d at 832. Thus, an employer does not act as a fiduciary simply because it amends a plan containing surplus assets that are partly attributable to employee contributions.[16]

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[15] *Spink* did not involve a multiemployer plan. Amendments of multiemployer plans may be subject to ERISA's fiduciary duty provisions to the extent such plans delegate the authority to amend the plan to fiduciaries that have authority to control and manage the operation and administration of the plan. *Siskind* v. *Sperry Retirement Program*, 47 F.3d 498, 506 (2d Cir. 1995); *Mahoney* v. *Board of Trustees*, 973 F.2d 968 (1st Cir. 1992) (Breyer, J.); but see *Walling* v. *Brady*, 125 F.3d 114, 118 (3d Cir. 1997). Contrary to respondents' suggestion (Br. in Opp. 18), the plan in this case does not resemble a multiemployer plan in the above respect, because Hughes specifically reserved for itself the authority to make plan amendments. Verhey Decl., Exh. 1 (Hughes Non-Bargaining Retirement Plan §§ 1.13 and 6.5(a) (Oct. 30, 1985)).

[16] Nor does *Varity Corp.* v. *Howe*, 516 U.S. 489 (1996), cited by the court of appeals (Pet. App. 15a-16a), support the conclusion that Hughes was acting as both a fiduciary and a plan sponsor when it amended the plan. In *Varity*, this Court held that an employer exercised the fiduciary function of plan administration when it made certain representations to employees regarding employee benefits. 516 U.S. at 498-503. The Court did not suggest in *Varity*, however, that an employer performs both fiduciary and settlor functions when it amends a plan. In any event, *Spink*'s subsequent holding makes clear that an employer does not act as a fiduciary in amending the plan that it sponsors.

There are good reasons not to impose fiduciary duties on employers when they amend a contributory plan to alter plan benefits. Congress generally left to employers such decisions as whether to establish a plan, what level of benefits to provide, and the source of the plan's funding. See *Spink*, 517 U.S. at 890; *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). Employers make those decisions for their own business interests, and, accordingly, such decisions "are not governed by fiduciary standards." *Sutter* v. *BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992). For instance, employers may decide to require employee contributions in order to provide for greater benefits, to lower costs to the employer, or to instill greater employee interest in the plan. Dan M. McGill & Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 181 (6th ed. 1989). Any attempt to impose on employers a fiduciary duty to act "solely in the interest of the participants and beneficiaries," 29 U.S.C. 1104(a)(1), would be both unworkable and inconsistent with Congress's policy decision to separate fiduciary from settlor functions under ERISA.

2. The other grounds respondents advance for distinguishing *Spink* are equally unpersuasive. Respondents cite 29 U.S.C. 1344 and 1053 to support the notion that ERISA treats contributory defined benefit plans differently from non-contributory plans. Br. in Opp. 19-20; see also Pet. App. 8a-9a. Section 1344 differentiates between employee and employer contributions, however, *only upon plan termination*. 29 U.S.C. 1344(a)(1), (d)(3)(A); see also pp. 6-7, 13, *supra*. Moreover, Section 1053's vesting provisions protect against forfeiture of *accrued benefits* and do not grant participants in an on-

going defined benefit plan property rights in plan *assets*. See pp. 19-20, *supra*. Thus, neither of those provisions supports imposing fiduciary duties on employers when they amend a contributory plan that is partly funded by employee contributions.[17]

Respondents also argue that amendments to a contributory plan, unlike amendments to a non-contributory plan, involve the "disposition" of plan assets within ERISA's definition of a fiduciary under 29 U.S.C. 1002(21)(A). Br. in Opp. 14-15, 17; see also Pet. App. 16a ("Hughes was disposing of the plan's assets when it amended the plan"). According to respondents, "Hughes, while ostensibly 'amending' the Plan, * * * actually disposed of its assets by closing it and making it a wasting trust." Br. in Opp. 17 n.8. Those contentions are without merit. *Spink* squarely held that a plan amendment to alter benefits—a matter of plan design—does not fall within ERISA's definition of a fiduciary. 517 U.S. at 890. Moreover, the source of the plan's assets does not dictate when an employer "disposes" of plan assets through plan management or administration. 29 U.S.C. 1002(21)(A). And, for the reasons previously stated, pp. 12-19, *supra*, respondents have no basis for claiming that the 1991 amendment terminated the plan or created a separate plan.

Finally, respondents assert that, because employees are "co-settlors" of a plan when they contribute to it, the employer is subject to fiduciary duties when it amends a plan funded by employee contributions. Br. in Opp. 17-18, 20; see also Pet. App. 14a. That is not correct. ERISA does not consider employees to be "co-settlors" of a plan just because they are required to contribute to it. See 29 U.S.C. 1002(16)(B)(i) ("[t]he term 'plan sponsor' means

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[17] Respondents similarly contend that *Spink* is not controlling in this case because their complaint "alleges breach of accrual, vesting and termination provisions of ERISA." Br. in Opp. 7, 10-12; see also Pet. App. 7a-8a. Those allegations, however, have no relevance to whether Hughes acted as a fiduciary within the meaning of 29 U.S.C. 1002(21)(A) when the company amended its plan.

* * * the *employer* in the case of an employee benefit plan established or maintained by a single employer") (emphasis added). True "co-settlors"—*e.g.*, an employer and a union that jointly establish a plan and are therefore defined as plan sponsors under 29 U.S.C. 1002(16)(B)(iii)—have no fiduciary duty to represent each other's interests in arriving at the terms of such a plan. See *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 336 (1981) (atmosphere in which ERISA fiduciary must operate is "wholly inconsistent with [the collective bargaining] process of compromise and economic pressure"); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953) (employer and union "owe[] complete loyalty to * * * the interests of [the parties] [they] represent[]"). Accordingly, respondents have not stated a valid claim that Hughes violated ERISA's fiduciary duty provisions when it adopted the 1989 and 1991 amendments to its plan.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 1998

(10)

No. 97-1287

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY and
HUGHES NON-BARGAINING RETIREMENT PLAN
Petitioners,

v.

STANLEY I. JACOBSEN, DANIEL P. WELSH,
ROBERT E. MCMILLIN, ERNEST O. BLANDIN, and
RICHARD E. HOOK,
Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

AMICI CURIAE BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION IN SUPPORT OF PETITIONERS

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AMICI CURIAE BRIEF OF THE HUGHES AIRCRAFT RETIREES ASSOCIATION AND HUGHES EMPLOYEES ASSOCIATION IN SUPPORT OF PETITIONERS

Hughes Aircraft Retirees Association ("HARA") and the Hughes Employees Association ("HEA") respectfully submit this Amici Curiae Brief in support of Petitioners, Hughes Aircraft Company ("Hughes") and Hughes Non-Bargaining Retirement Plan (the "Plan").[1]

[1] Pursuant to Supreme Court Rule 37.6, this Brief was authored in its entirety by attorneys at O'Melveny & Myers LLP, counsel for HARA and HEA. HARA and HEA were the only persons or entities who made a monetary contribution to the preparation and submission of this Brief.

The consent of counsel for Petitioners and Respondents has been obtained and is filed concurrently herewith.

NATURE OF THE INTEREST OF THE AMICI CURIAE

The Supreme Court should approach this case without illusion as to the consequences of this matter on the Hughes' employees who participate in the Plan and on the Hughes' retirees under the Plan.

A. Hughes Employees Association -- HEA was incorporated as a non-profit California corporation in 1953. Membership in HEA is extended to all employees of Hughes. HEA members are participants in the Plan.

HEA's opposition to the Ninth Circuit's Jacobson decision is hardly unexpected. Judge Norris' dissent refers to the "serious adverse consequences" that the majority's decision will have upon the current employee participants in the Plan. See Petition for Writ of Certiorari ("Petition") at 48a. Either Plan termination or the inability to use Plan assets to fund the noncontributory feature of the Plan would work a substantial hardship on HEA's members. For these reasons, HEA opposes the Ninth Circuit's decision in its entirety.

B. Hughes Aircraft Retirees Association -- HARA represents Hughes' retirees. It was formed in 1986 as a non-profit organization by Hughes' retirees. HARA's goals are to provide an educational and social forum for Hughes' retirees and to provide them with an opportunity

to participate in group activities and community service. From its initial base of less than 20 members, HARA has grown to a membership of over 900 Hughes' retirees, residing primarily in Southern California, but also elsewhere. Although HARA is recognized as an organization by Hughes, it is an independent retiree organization operating under its own bylaws and governed by a 26-person volunteer board of directors.

HARA's participation in this Brief may seem surprising because Respondents have asserted, and convinced the Ninth Circuit, that the retirees would favor the results in the majority opinion. This is not the case. The HARA Board has thoroughly reviewed this matter and has concluded that the Ninth Circuit's opinion is erroneous and will, on balance, make retirees worse off. How HARA reached this conclusion is explained below.

SUMMARY OF ARGUMENT

Termination of the Plan significantly harms Hughes' employees and retirees by eliminating cost-of-living increases to the thousands of persons who retired from Hughes after 1990, by denying the possibility of future ad hoc pension increases, and by withdrawing the current federal-agency guarantee that protects Hughes' pension promises -- all to an extent far greater than the one-time monetary distribution each Plan participant might receive upon Plan termination. For these reasons, HARA and HEA fully support Petitioners' arguments and urge this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. TERMINATION OF THE PLAN AND DISTRIBUTION OF PLAN ASSETS WILL DETRIMENTALLY AFFECT HARA AND HEA MEMBERS.

It is obvious why current employees are severely harmed by the Ninth Circuit's holding that the Plan has been terminated. What may be less obvious, however, is why current retirees, the class supposedly benefited by the Ninth Circuit's decision, will be harmed if the Ninth Circuit's misreading of the law is not remedied. In fact, HARA's members are harmed by Respondents' attempt to treat the Plan as terminated as of January 1, 1991 (Complaint ¶ 42, Petition at 141a) and to require immediate distribution of all Plan assets (Complaint ¶ 56, Petition at 143a). While a termination may, at first, appear beneficial to Hughes' retirees, the only persons certain to gain from this outcome are Respondents' lawyers. This portion of the Brief explains why a termination decision harms Hughes' retirees. [While the arguments set forth below apply with equal force to Hughes' active employees, for ease of explanation, this portion of the Brief simply will refer to HARA and the Hughes' retirees.]

The singular disadvantage of plan termination is that the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq., ("ERISA") generally requires that all plan assets be distributed in the form of annuity contracts. ERISA § 4041(b)(2)(D), 29 U.S.C.

§ 1341(b)(3); 29 C.F.R. § 4041.3. This has several consequences:

First, although the contributory feature of the Plan generally contains a maximum 4% cost-of-living adjustment (see Plan § 4.13-A, App. A),[2] the Plan provides that, in the event of its termination, cost-of-living increases are only available to participants who already have retired as of the date of termination. See Plan § 4.13-A(c), App. A. The cost-of-living feature would thus be lost for the thousands of persons who retired after 1990, the date of the Plan's alleged termination.

Second, Plan termination will cause all retirees to lose the possibility of any future pension increases that might otherwise be financed from the Plan's surplus. For example, because the Plan's cost-of-living adjustment feature is limited to a 4% annual increase (see Plan § 4.13-A, App. A), the only source of protection for future inflation increases in excess of 4% would be in the form of ad hoc amendments by Hughes financed from the Plan's surplus. But no such surplus will exist if all Plan assets are distributed.

There is, however, an even more fundamental problem. The distribution of annuity contracts on Plan termination relieves the Pension Benefit Guaranty Corporation ("PBGC"), the federal agency that otherwise

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[2] For the Court's convenience, Appendix A contains Section 4.13-A, Cost of Living Adjustment, Hughes Non-Bargaining Retirement Plan, which is properly before the Court at page 339 of Appellants' Excerpts of Record.

guarantees benefits, from what otherwise would be its obligation to stand behind Hughes' pension promises. PBGC Op. No. 91-1 ("the statute does not authorize PBGC to guarantee benefits distributed in the form of irrevocable annuity contracts from insurance companies."), 1991 Westlaw 80739 at *1 (P.B.G.C.), Pens. Plan Guide (CCH) ¶ 23,824. In light of the well-known insolvencies of Executive Life Insurance Company and Mutual Benefit Life Insurance Company (both of which were highly rated until shortly before their insolvencies), HARA understandably prefers the greater safety of an unterminated Plan with PBGC protection. This provides both the safety margin of today's surplus (including its maximum 4% cost-of-living adjustment and the possibility of future ad hoc pension increases) and, if the Plan is later terminated, a federal-agency guarantee.

The HARA Board carefully considered the possibility that the decreased security and loss of potential pension increases would be offset by Respondents' hoped-for increase in pension benefits upon Plan termination. The possibility of any such increase, however, may prove illusory.

For example, while Respondents assert that the entire surplus belongs to them, Hughes may not agree. Using Respondents' own estimates of employee and employer contributions (Complaint ¶ 21, Petition at 135a-136a), it would appear that at least 60 percent of the surplus could be claimed by Hughes, leaving only 40 percent available to be split between Hughes' retirees and

employees.[3] HARA further estimates that, based on the 1995 actuarial report for the Plan by the independent actuarial firm of Towers Perrin, retirees would be entitled to about 70 percent of the surplus not claimed by Hughes, and active employees would be entitled to the remaining 30 percent of the surplus not claimed by Hughes. (This 70/30 split is based on the relative value of benefits allocable to each two groups.) As a result, the $1.2 billion surplus at December 31, 1990 (Complaint ¶ 23, Petition at 136a) may only result in $336 million being available for retirees (70% of 40% of $1.2 billion equals $336 million) -- an increase far less valuable to HARA than the security for benefits provided by the surplus.

What has not been mentioned in the lawsuit at this point, as it could not be at the pleading stage, is the fact that the Department of Defense, which has been Hughes' largest customer for many of the years in question, can be expected to assert a claim to a substantial portion of any pension surplus, as it generally does when a company that has derived revenue from government contracts terminates

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[3] ERISA generally provides that any available surplus is allocated between the value of employer and employee contributions. See ERISA § 4044(d), 29 U.S.C. §1344(d). HARA developed its estimates of these two amounts by increasing the contributions set forth in Complaint ¶ 21 (Petition at 135a-136a) by eight percent interest and comparing the total value of employer and employee contributions as of December 31, 1990. This inexact method is, of course, no substitute for the actual calculations that would be required in order to divide the surplus. Nevertheless, it was necessary for HARA to undertake some type of estimating process to assess the impact of Jacobson on its members.

an overfunded pension plan.[4] Although the effect of such a claim is uncertain at this time, it could result in a further reduction of surplus.[5]

In sum, the 1995 actuarial report by Towers Perrin states that the present value of retirement benefits at that time was $2.55 billion. When one measures this amount against the portion of the surplus that Hughes' retirees might actually receive, HARA concludes that the potential

[4] 48 C.F.R. § 31.205-6(j)(4) provides in pertinent part:

> Termination of defined benefit pension plans. When excess or surplus assets revert to the contractor as a result of termination of a defined benefit pension plan, or such assets are constructively received by it for any reason, the contractor shall make a refund or give a credit to the Government for its equitable share of the gross amount withdrawn....

[5] Exactly how the regulations governing the allowance of pension costs in government contracts apply will vary depending on the nature of each individual contract. Moreover, the way any such claim would be treated in a case like this one, where a court rules that a termination occurred (rather than a situation where a company voluntarily terminates its plan to recover surplus) is unknown. Therefore, it is difficult to say exactly how any such claim would affect the size of the plan surplus. Nevertheless, we note that government contractors generally may only include as a pension cost the cost of pension benefits as provided for in the benefit plan that is in effect at the time of the contract. 48 C.F.R. § 9904.412-50(b)(5) ("Pension cost shall be based on provisions of existing pension plans. . . ."); 48 C.F.R. § 9904.412-60(b)(3) ("in calculating pension costs, the contractor may not assume future benefits greater than that currently required by the plan"). This could potentially allow the government to claim the whole surplus to the extent it exceeds the benefits provided by the Plan formula that existed at the time of the government contracts.

benefit increase might amount to no more than 5 or 10 percent and, for the reasons described above, might be much less. This potential increase is not worth giving up the additional security provided by a PBGC guarantee, possible future ad hoc pension increases similar to those Hughes has granted in the past, and, for some retirees, the promise of cost-of-living pension increases.

II. PLAN TERMINATION HAS NOT OCCURRED. THE PLAN HAS BEEN AND REMAINS ONE PLAN.

HARA and HEA also submit that, as a matter of law and contrary to the decision of the Ninth Circuit, no Plan termination has occurred. Moreover, the Ninth Circuit erred in finding that the addition of the non-contributory benefit structure to the existing Plan on January 1, 1991, created two distinct plans, even though all benefits continue to be paid from a single trust fund. The suggestion of the Ninth Circuit that, at least under certain circumstances, multiple plans exist for purposes of ERISA even when all trust assets are available to pay all benefits would spread confusion throughout the appellate circuits and is inconsistent with the existing case law and regulations. Employers, employees, and retirees would not know what new rules would apply. As Petitioners more fully develop in their brief of the merits, the Plan constitutes one plan within the meaning of ERISA -- both before and after the January 1, 1991 amendment. In this regard, HARA and HEA adopt and fully agree with Petitioners' arguments.

CONCLUSION

For the foregoing reasons, Hughes Aircraft Retirees Association and Hughes Employees Association respectfully submit that this Court should reverse the judgment below and remand this matter for action in accordance with this Court's decision.

DATED: July 2, 1998.

Respectfully submitted,

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APPENDIX

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APPENDIX A

SECTION 4.13-A, COST OF LIVING ADJUSTMENT, HUGHES NON-BARGAINING RETIREMENT PLAN

Section 4.13-A of the Hughes Non-Bargaining Retirement Plan, entitled "Cost of Living Adjustment," states:

(a) The monthly Benefit payable under Section 4.2-A(a)(i) of the Normal Retirement Benefit, 4.7-A(a)(i) of the Early Retirement Benefit or 4.9-A(a)(i) of the Late Retirement Benefit or in respect of a Participant during any Plan Year (the "subject Plan Year") after the first Plan Year in which monthly Benefits were so payable shall be adjusted by multiplying the monthly Benefit so payable during the Plan Year immediately preceding the subject Plan Year (after applying the Cost of Living Adjustment to such preceding Plan Year) by a factor (not over 1.040 and not under 0.960) computed to at least three decimal places, determined by dividing:

(i) the United States Bureau of Labor Statistics Consumer Price Index (All Urban Consumers, all items, United States city average, 1967 = 100) as revised, for the September next before the subject Plan Year

by

(ii) such Index for the September of the second year before the subject Plan Year.

(b) Notwithstanding the provisions of subsection (a), the adjustment provided in such subsection shall not result in a monthly Benefit less than the monthly Benefit initially payable to or in respect of the Participant.

(c) If the Plan is terminated under Section 6.1, no further adjustments shall be made under this Section, except as to Former Participants who had retired under a Normal Retirement Benefit, Early Retirement on or after his fifty-fifth (55th) birthday or Late Retirement Benefit (but not if his Separation from the Service was prior to being Vested) on or prior to the date of such termination.

(d) No adjustment shall be made under this Section to a Benefit payment payable in a lump sum on the death of a Participant as described in Section 4.2-A(a)(ii) of the Normal Retirement Benefit.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AS AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING RESPONDENTS

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BRIEF AS AMICUS CURIAE OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION SUPPORTING RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment and civil rights disputes. It is the country's only professional membership organization of lawyers who represent employees in employee benefits, employment discrimination, wrongful discharge and other employment-related cases.

NELA has devoted its efforts to supporting precedent-setting litigation and legislation affecting the rights of individuals in the workplace. NELA has an interest in the application of the Employee Retirement Income Security Act ("ERISA") because the clients of NELA members frequently have employee benefit claims. NELA is qualified to brief this Court on the implications of its decision in this case, having participated as amicus curiae in numerous other cases involving ERISA and other employment laws, including *Varity Corp. v. Howe*, 516 U.S. 489 (1996), *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

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[1] The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk. No counsel for any party has authored any portion of this brief. No persons other than NELA or its counsel have made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

In the instant case, the employer, Hughes Aircraft Company ("Hughes Aircraft" or "Hughes") and salaried employees who so elected made contributions to fund a retirement plan for the exclusive benefit of the contributing employees and their beneficiaries. The employees made their contributions from after-tax income. Hughes Aircraft's contributions were from before-tax funds.

Over time, the employer and employee contributions generated sufficient funds to pay the benefits described in the plan's benefit formula and to leave a surplus. Hughes Aircraft discontinued its contributions to the plan in 1987. The Ninth Circuit upheld that discontinuance and the plaintiffs did not seek rehearing or certiorari concerning that decision.

Discontinuing its own contributions was not, however, enough for Hughes Aircraft. Hughes wanted to use the entire $1+ billion surplus, half of which had been generated by the employees' contributions, to fund other corporate pension obligations. In 1989 and 1990, Hughes adopted amendments to deplete the surplus for Hughes' own benefit.[2] By its 1990 amendment, Hughes took a surplus that had accumulated as a result of employee contributions by plaintiff Jacobson and other

[2] The Jacobson complaint alleged that the 1989 amendment, which conferred early retirement incentives on only a select group of participants, violated Section 5.2 of the Plan which provides that the Plan shall be administered and interpreted fairly and equitably. The Ninth Circuit ruled that this claim could not be dismissed. 105 F.3d 1302. Hughes did not petition for certiorari on this ruling and does not discuss it in its brief.

employees over a 40-year period and began to use that surplus to fund Hughes Aircraft's pension obligations to non-contributing employees. In essence, Hughes Aircraft contended that it owned the beneficial interest to the entire surplus.

NELA submits that the Ninth Circuit did not err in reversing the district court's dismissal under Rule 12(b)(6) of the employees' complaint for two reasons: First, the terms of the governing plan instruments -- the Plan document and Trust Agreement -- expressly prohibit use of the surplus funds for any purpose other than to benefit the contributing employees. Under the common law of trusts and ERISA, where the trust instruments contain such prohibitions, a settlor's purported amendment of those instruments to advance its own interests and diminish the beneficial interests of other persons who have contributed to the trust must not be given effect. If Hughes were allowed to take the contributory surplus as its own, Hughes would be taking the beneficial interest in all of the trust property as if Hughes was the only donor.

In addition, as explained below, Hughes' actions violated four sections of ERISA: ERISA §208, 29 U.S.C. §1058 (transfer of assets to new plan requires that assets distributable to employees on plan termination be protected), §403, 29 U.S.C. §1103 (inurement of assets to benefit of employer is prohibited), §404, 29 U.S.C. §1104 (fiduciaries, who are defined as the entities or persons with the authority to dispose of plan assets, have duty to act for exclusive benefit of participants) and §4044, 29 U.S.C. §1344 (surplus assets from employee contributions must be distributed to employees on plan termination).

ARGUMENT

I. The Obligations of ERISA Pension Trusts to Employees Who Make Employee Contributions Do Not Stop With Payment of Defined Benefits

Hughes' Brief repeatedly states that the Contributory Plan was a defined benefit plan, as if payment of the defined benefits precludes any further inquiries into Hughes' actions. Pet. Br. at 1-3, 12-13, 43-44. Hughes contends that because the plan is called a defined benefit plan, there can be no obligation to the contributing employees beyond paying the formulaic defined benefits. *Id.* As the rules described below demonstrate, this amounts to mere word play.

By the terms of its governing plan documents, any defined benefit plan, whether or not funded by employee contributions, may provide rights beyond the benefits defined in the basic benefit formula. For example, a pension plan may, by its terms, provide that the employee-participants have the right to all surplus assets upon plan termination. See, *e.g.*, *Delgrosso v. Spang & Co.*, 769 F.2d 928 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986). As described in the next section, the governing instruments of the Hughes Plan created rights beyond the defined benefits payable to the participants under the plan's benefit formula. Thus, Section 6.5 of the Hughes Plan document and Section 4.2 of the Trust Agreement promised contributing employees that no amendment would divert any part of the Trust Fund to purposes other than their exclusive benefit.

ERISA creates several mandatory rights when a defined benefit plan is funded in part by employee contributions. First, ERISA requires that vesting in such contributions must be

immediate. ERISA §203(a)(1), 29 U.S.C. §1053(a)(1). Second, ERISA contains a large number of exceptions to the nonforfeitability of benefits derived from employer contributions, ERISA §203(a)(3)(A)-(F), 29 U.S.C. §1053(a)(3)(A)-(F), but there are no exceptions to the nonforfeitability of benefits derived from employee contributions. Third, the accrued benefit that must be provided to employees who make employee contributions must at a minimum equal the sum of their accumulated contributions with interest, regardless of the amount otherwise payable under the benefit formula. ERISA §204(c)(2)(B), 29 U.S.C. §1054(c)(2)(B).

Further, following the common law of trusts, ERISA expressly provides that employees who contribute to a defined benefit plan have conditional rights on termination of the plan and on transfer of any of the plan's assets before termination. As the Fifth Circuit concluded in *Borst v. Chevron*, "so far as concerns surplus assets, . . . ERISA . . . markedly distinguishes between those attributable to employee contributions and those attributable to employer contributions." 36 F.3d 1308, 1315 (1994).

First, under ERISA §4044(d)(3), 29 U.S.C. §1344(d)(3), employees who have made employee contributions to a pension plan with a surplus must receive a proportionate part of the surplus on termination of the trust. See *Holland v. Valhi, Inc.*, 22 F.3d 968 (10th Cir. 1994). Second, ERISA requires protection of the contributing employee's right to a proportionate share of the surplus assets if the employer seeks to transfer some of the plan's assets to a new plan. ERISA §208, 29 U.S.C. §1058, and the related Treasury Regulations at 26 C.F.R. 1.414(l)-1 require that the employees' share of the surplus assets be set aside for them in these circumstances as if the plan had terminated and an

ERISA §4044 termination-basis distribution had occurred. The proportionate share of the surplus that is due the contributing employees may not be transferred to another plan.

The protections afforded participants who make employee contributions were carefully considered. After hearings about a reversion to the Elgin Watch Company of surplus assets generated by employee contributions, the Senate Labor Committee concluded that it was "unfair to permit the complete recapture by employers of surplus funds in terminated contributory plans, without regard to the fact that contributions by the workers helped to generate the surplus." S. Rep. 93-127, 30, I ERISA Leg. Hist. 616, reprinted at 1974 U.S.C.C.A.N. 4835, 4856.

The distinctions that ERISA recognizes with respect to assets attributable to employee contributions are also found in trust law. In trust law, individuals who make contributions to a trust fund are described as "donors" or "contributors." When several donors contribute to a trust and the trust is fully performed without exhausting the trust assets, a resulting trust in the surplus arises in favor of the donors in proportion to their contributions. *Scott on Trusts*, §§411.6 and 430.3. A resulting trust arises because the circumstances raise an inference that the persons contributing to the trust did not intend for the trustee or any one donor to have the beneficial interest in all the property. *Restatement of Restitution*, §160, comment b.

As the Ninth Circuit stated in this case, "[i]n essence, when a plan is funded by both employer and employee contributions, both the employer and the employees are *co*-settlors of the plan." *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1296 (9th Cir. 1997). Although the Ninth Circuit did not cite author-

ity for this statement, it is an established principle of trust law that "[a] person who furnishes the consideration for the creation of a trust is the settlor . . . ." *Scott on Trusts*, Sec. 156.3 at p. 180. See also *Bogert, Law of Trusts & Trustees* (Rev'd 2d ed.), Sec. 41 at p. 428; *Ruocco v. Bateman, Eichler, Hill, Richards, Inc.*, 903 F.2d 1232, 1239 (9th Cir.), *cert. denied*, 498 U.S. 889 (1990) (employer was not settlor of disability plan where premiums were paid by employees). Logically, if more than one person funds the trust, both are settlors.

Elsewhere, Hughes Aircraft challenges whether the contributing participants have a "legally cognizable property interest" in the surplus trust assets. Pet. Br. at i. It is, however, black letter law that the beneficial interest of contributors/beneficiaries in surplus trust assets is a cognizable property interest. Many trusts provide for successive or conditional interests; the beneficiaries who receive the surplus after a designated period or event are called remaindermen or reversioners. See, *e.g.*, *Great Northern Iron Ore Properties*, 263 N.W.2d 610 (Minn. 1978), *cert. denied sub nom.*, *Arms v. Watson*, 439 U.S. 835 (1978). The *Restatement (Second) of Trusts* expressly provides:

> If a trust is created for beneficiaries in succession [for example, a beneficiary who receives the income during a designated period, with the remainder going to another beneficiary], the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests.

§ 232; see *id.* comment b (trustee under a duty to the latter beneficiary to "take care to preserve the trust property for him").

This Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996), recognizes the need to preserve assets to satisfy successive beneficial interests. In *Mahoney v. Boston Shipping Assn.-ILA Pension Plan Trustees*, 973 F.2d 968, 972 (1st Cir. 1990), then Chief Circuit Judge Breyer recognized not only the duty of impartiality between present and future beneficiaries, but also the stricter scrutiny that applies where the interests of beneficiaries are sacrificed to the interests of non-beneficiaries, as in *Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325 (3d Cir. 1984). At least absent a reservation in the trust instruments, the interest of conditional beneficiaries may not be undermined by transferring surplus assets to finance other obligations of a non-beneficiary employer.[3]

As this court has recognized, establishment of an employee benefit plan is voluntary. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). However, once a plan is established, settlors and fiduciaries may not ignore or avoid the governing trust documents or ERISA. This is particularly true after contributions to the trust have been solicited from other donors, in this case, the employees. ERISA requires contributory defined benefit plans to recognize beneficial interests beyond those required for non-contributory plans. As demonstrated in the following sections, plaintiffs' complaint set forth claims that defendants' actions cut down those interests in violation of several provisions of law. Consequently, the Ninth Circuit

[3] See *Restatement (Second) of Trusts*, §331, comment a (unless the settlor has reserved the power, he cannot modify the trust "by cutting down or taking away the interest of any beneficiary").

properly held that plaintiffs' claims should not have been dismissed on a Rule 12 motion.

II. Hughes' 1990 Amendment Violates the Rules of the Plan and Trust; Accordingly, Jacobson's Complaint Cannot Be Dismissed under Rule 12

Accepting the allegations of the complaint as true, Hughes Aircraft adopted an amendment in 1990 to use surplus assets attributable to employee contributions to finance Hughes' pension expenses for employees who never made contributions. As discussed below, that amendment was in violation of the terms of the Plan's governing instruments. Consequently, in putting the amendment into effect, Hughes, which also served as the Plan Administrator entrusted with interpreting the governing instruments, breached its fiduciary duties under ERISA. See ERISA §404(a)(1)(A), (B) and (D), 29 U.S.C. §1104(a)(1)(A), (B) and (D) (duties to act exclusively in the interests of participants, to act prudently, and to act in accordance with the governing plan documents).[4]

Section 6.5(b) of the governing Plan document expressly and plainly provided:

> No amendment shall be made at any time under which any part of the Trust Fund may be diverted to purposes other than for the exclusive benefit of Participants and their Beneficiaries . . . .

[4] Plaintiffs may enforce their rights under the terms of the pre-1990 plan documents pursuant to ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B) (to enforce "rights under the terms of the plan") or §502(a)(3), 29 U.S.C. § 1132(a)(3) (to redress a violation of the terms of the plan or ERISA).

J.A. 97. Section 4.02 of the Trust Agreement, which may only be amended by agreement of the Trustee, contained the identical commitment that "[n]o amendment shall be made at any time under which any part of the Trust Fund may be diverted to purposes other than the exclusive benefit of the Participants and Beneficiaries." J.A. 184.[5]

The Plan document defined "Participants" as the non-bargaining unit employees who agreed to make Participant Contributions to the Plan. Specifically, Section 1.39 of the Hughes Plan document defined Participant as any person included in the Plan as provided in Article II. Article II provided that Participants were the nonbargaining unit employees who "as a condition precedent to participation" agreed to make Participant Contributions.[6] Hughes Aircraft's 1990 amendment violated the express terms of the Plan document and Trust Agreement by diverting part of the Trust Fund to purposes other than the exclusive benefit of the Participants and Beneficiaries -- the non-bargaining unit employees who made employee contributions and their beneficiaries.

Amicus believes that it would be circular to allow Hughes Aircraft to avoid this prohibition in the Plan document and Trust Agreement by amending the definition of Participants and Beneficiaries to include different groups of employees who never made any employee contributions to the Plan. The Plan

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[5] The briefs of the Petitioners and its amici nowhere address the express limitation on amendments in the Hughes Plan document and Trust Agreement.

[6] The Record below contains these definitions but they were omitted from the Joint Appendix. They are contained in an appendix to the Respondents' brief.

document and Trust Agreement refer to the Participants and Beneficiaries with capitalized first letters. The definitions of those terms limit the employees to those who contribute to the Plan.

A motion to dismiss may not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The complaint alleged that Hughes failed to follow the Plan's own terms in violation of ERISA. At a minimum, those terms are ambiguous and present an issue of interpretation that the District Court must resolve. Accordingly, the Ninth Circuit correctly held that Jacobson's complaint should not have been dismissed on a Rule 12 motion.

III. Employers Are Not "Generally Free" to Amend Contributory Pension Trusts in Violation of Trust Rules or ERISA's Protections for Contributing Employees

In its Petition and Brief, Hughes Aircraft contends that the Ninth Circuit erred by refusing to follow this Court's holding in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), that the "act of amending the pension plan does not trigger ERISA's fiduciary provisions." *Amicus* respectfully submits the Ninth Circuit ruled correctly because this Court and others have concluded that while employers are "generally free" to amend employee benefit plans, the power to amend is not unlimited. See, *e.g.*, *Spink*, 517 U.S. at 891 ("other portions of ERISA govern plan amendments").

First, employee benefit plan fiduciaries may not implement amendments that violate either ERISA or the governing documents that the fiduciaries are entrusted with implementing. ERISA §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D). This duty parallels the duties of common law trustees who must interpret trust terms to determine the extent to which a settlor has reserved authority to use trust assets for the settlor's own benefit. See *Scott on Trusts* (4th ed.), §331 (if settlor reserves power to modify trust, he can only modify "to the extent to which he has reserved the power"); *Restatement (Second) of Trusts*, §331, comment a (settlor may not cut down or take away any beneficial interest unless authority to do so is reserved in terms of the trust).

In addition to the fiduciary duties to review amendments before implementing them, the Ninth Circuit concluded that ERISA's fiduciary duties are implicated when an employer, acting as both settlor and plan administrator, takes plan assets attributable to employee contributions and uses them to fund a new plan for employees who were never contributors. 105 F.3d 1296-98. In so holding, the Ninth Circuit distinguished *Spink* as a case where the employer used plan assets to give an extra benefit to one group of participants in the plan. This distinction is sound for three reasons. First, a disposition of plan assets for the credit of a sponsoring employer or union, instead of any participants in the plan, clearly implicates fiduciary duties. ERISA §3(21)(A), 29 U.S.C. §1002(21)(A), defines a fiduciary by reference to the exercise of "any authority or control respecting . . . disposition of [the plan's] assets." A transfer of pension plan assets to another plan implicates fiduciary duties even if the same employer sponsors both plans. See, *e.g.*, *Cutaiar v. Marshall*, 590 F.2d 523 (3d Cir. 1979) (fiduciaries violated ERISA by transferring assets to related plan). Second, to hold to the contrary would allow employers to undermine the beneficial rights to a contributory surplus that Congress mandated by taking surplus plan assets from the contributing employees and using them to finance the employer's obligations to non-beneficiaries.

Third, other circuits have reached the same conclusion where employers who double as plan administrators or trustees have taken trust assets for their own benefit through amendment or other formal action. In *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), an amendment converting a profit-sharing plan that originally limited investments in employer stock into an ESOP that would invest in employer stock disposed of plan assets in violation of ERISA's fiduciary duties. In *Struble v. New Jersey Brewery Employees' Welfare Fund*, 732 F.2d 325 (3d Cir. 1984), employer trustees breached their fiduciary duties when they voted to give surplus plan assets to themselves, instead of using the assets to provide benefits to retirees. See also *In re Gulf Pension*, 764 F. Supp. 1149, 1210 (S.D. Tex. 1991), *aff'd sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995) (transfer of plan assets to pension plan established by purchaser of division violated fiduciary duties when it resulted in "dollar-for-dollar payback" to the seller); *Werschkull v. United Cal. Bank*, 149 Cal. Rptr. 829 (Cal. Ct. App. 1978) (amendment transferring excess assets from one plan for credit against contributions to another plan disposed of plan assets in breach of fiduciary duty).

Essentially, Hughes Aircraft has taken the surplus accumulated from employee contributions and credited it to its own account to finance non-contributing employees' pensions. This violated the express Plan rule described previously, and it violated ERISA's fiduciary duties because it disposed of assets

in a manner that benefited the employer, and not any of the contributory plan beneficiaries. As described below, Hughes' actions also violated ERISA's rules on transfers of assets and non-inurement of plan assets to the employer.

IV. Hughes Is Not Entitled to Dismissal of Jacobson's Claim that the Amendment Transferring Assets from the Contributory Plan to a New Non-Contributory Plan Violates ERISA Section 208

Relying on Treasury Regulation 1.414(l)-1(b)(1), Hughes Aircraft and its *amici* contend that the "alternative benefit structure" that Hughes created in 1990 could not possibly be a new plan. Hughes contends that if it creates a noncontributory plan but designates it as part of the contributory plan, its designation combined with the regulation require dismissal. See Pet. Br. at 27-29.[7] However, if the alternative benefit structure amounts to a new plan, the transfer of assets to finance it without protecting the participants' beneficial interest in the surplus violates ERISA §208, 29 U.S.C. §1058.[8]

The Treasury Regulation on which Hughes and its *amici* rest their case states only that a plan will not fail to be a single

[7] The suggestion by Hughes that it could take the surplus even if the non-contributory structure was considered a new plan (Pet. Br. at 29 n.6) is mistaken. See 26 C.F.R. 1.414(l)-1(b)(5), (n) and (o).

[8] Such a transfer might also violate ERISA §406(b), 29 U.S.C. §1106(b). *Cutaiar v. Marshall*, 590 F.2d 523 (1979) (loan of assets by one plan to another with an identical board of trustees violated ERISA §406(b) where the participants in the plans were not identical); *Donovan v. Mazzola*, 716 F.2d 1226 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (same).

plan "merely because" it "has several benefit structures which apply . . . to . . . different participants." 26 C.F.R. 1.414(l)-1(b)(1)(i) (*emph. added*). The regulation does not define "benefit structures," but the normal usage of the term is to describe a benefit formula or rates. See 29 C.F.R. 2520.102-4 and Solicitor General ("SG") Br. at 18-19. The "merely because" language means only that, standing alone, different benefit structures do not constitute different plans.[9] Petitioners' interpretation of this regulation would rewrite the regulation to provide that whenever an employer denominates something as a different benefit structure it can never amount to a new plan for purposes of the protection in ERISA §208.

Respondents' Complaint described the many respects in which Hughes "alternative benefit structure" was unlike the existing Contributory Plan and like a new plan. The most fundamental respect is that what was a Contributory Plan for 40 years is now purportedly both a Contributory and a Non-Contributory Plan. In the employee benefits field, pension plans are not both contributory and non-contributory: A plan is either one or the other. *Amicus* can find no treatise or other source that refers to a plan that is both.[10]

[9] The Petitioners acknowledge that the "benefit structure" of a plan does not encompass its contribution structure. Pet. Br. at 20-21.

[10] See Dan M. McGill, *Fundamentals of Private Pensions* (Irwin 5th ed.), 87, 132-33, 165-69; Everett T. Allen, et al., *Pension Planning* (Irwin 8th ed.), 222-23; Michael G. Kushner, et al., *Employee Benefits Desk Encyclopedia* (BNA 1996) (definitions of "contributory plan" and "noncontributory plan"). A very small number of non-contributory plans accept employee contributions on a completely voluntary basis, with separate accounting for those

A plan that is both contributory and non-contributory would be like a Minotaur, half bull and half man. While the benefit formulas offered by a contributory and a non-contributory plan could be similar, the rules on participation, the ERISA rules, the funding mechanism, and the related accounting are completely different.[11] The separation between the two plans is also shown by Hughes' own description of the non-contributory plan to its employees as the "new retirement plan." J.A. 193. The separate nature of the two plans is further shown by looking at exhibits submitted by Hughes. The rules of each plan are stated in two separate Exhibits, Exhibits A and B, which are attached to the Verhey Declaration. J.A. 33-170. The two sets of rules are only joined by a cover document and boilerplate provisions which themselves differ in many cases depending on the "Applicable Exhibit." The only connection between the two plans with any significance is that Hughes is drawing on the surplus that accumulated under the Contributory Plan to fund the non-contributory "structure." The pretense that there is one plan is for one purpose -- to give Hughes access to the Contributory Plan's surplus assets.

ERISA has long recognized that plan sponsors cannot designate what is and is not an ERISA plan by their nomenclature. Rather, in deciding whether an employee benefit plan has been created, courts apply a functional test: whether "from the surrounding circumstances a reasonable person can ascertain the

contributions. But a non-contributory plan that mandates employee contributions is a contradiction in terms.

[11] The benefit and tax rules on employee contributions require that plan administrators keep separate accounts of such contributions.

intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (*en banc*).[12] Petitioners and their *amici* appear to seek a rewritten regulation that would allow them complete freedom to avoid ERISA's substantive protections through names and not so carefully concealed shams.[13]

For these reasons, Respondents' complaint should not be dismissed on a Rule 12(b)(6) motion for "failure to state a claim on which relief can be granted." Respondents are entitled to the opportunity to prove that what Hughes designates as alternative benefit structures amount to "more than one plan." It is for the District Court to consider the parties' arguments on this point based on a developed record. If a Defendant can obtain a dismissal of allegations like these under F.R. Civ. P. 12, the regulations adopted to implement ERISA §208 will be rewritten as an unqualified rule that whatever an employer describes as an alternative benefit structure may never be a separate plan. That is not what the regulations provide.

[12] *Dillingham* has been widely followed. See, *e.g.*, *Memorial Hospital Sys. v. Northbrook Life Ins. Co.*, 904 F.2d 236 (5th Cir. 1990); *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989); *Northwest Airlines v. Federal Ins.* Co., 32 F.3d 349 (8th Cir. 1994).

[13] An employer cannot avoid the *Dillingham* principle by failing to adopt one or two legal formalities. Similarly, an employer cannot claim that a non-contributory plan is part of a contributory plan by adopting one or two insignificant legal formalities to bolster its position.

V. Whether the Ninth Circuit Erred in Refusing to Dismiss Respondents' ERISA Section 403 Inurement Claim Was Not Among the Issues Presented for Review; If the Court Considers Petitioners' Arguments, the Ninth Circuit's Decision Should Be Affirmed

Hughes' petition for *certiorari* did not request that this Court address the Ninth Circuit's refusal to dismiss Plaintiffs' first claim for relief, which alleged that by amending the plan to use plan assets to benefit itself, Hughes violated ERISA's anti-inurement rule: ERISA §403, 29 U.S.C. 1103. Petition for Writ of Certiorari at i. Both Hughes and the Solicitor General nevertheless ask this Court to hold that the Ninth Circuit erred in ruling that the anti-inurement claim should not dismissed. Brief for Petitioners at i (Question 2); SG Brief at I (Question 2).

The Ninth Circuit's ruling on inurement was not one of the questions presented to this Court for *certiorari*. Nor did the Petitioners argue against the ruling in the body of the brief in support of *certiorari*. This does not appear to be an oversight. The Ninth Circuit addressed this claim at greater length than any other claim. 105 F.3d at 1292-1296. It is well-settled that "only the questions set out in the petition, or fairly included therein, will be considered by the Court." Supreme Court Rule 14.1(a) and 24.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 535-36 (1992); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992).

In an abundance of caution, however, we address the points the Petitioners raise. Like the Plan rule that no amendment shall divert part of the trust fund for purposes other than

the exclusive benefit of the employees who made contributions, ERISA's anti-inurement rule provides:

> Except as provided [under certain specified sections of ERISA], the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administration.

29 U.S.C. §1103(c)(1).

As the Ninth Circuit noted, there is no authority for the proposition that the anti-inurement provision is limited to situations where assets inure as a result of a <u>fiduciary's</u> actions. 105 F.3d 1294; *accord* SG Brief at 21. Thus, an amendment made by Hughes Aircraft as a non-fiduciary may violate the rule of inurement. There is also no question that the anti-inurement rule applies to "surplus" assets. As the Seventh Circuit held in *Hawkeye Nat'l Life Ins. Co. v. Avid Industrial Corp.*, 122 F.3d 490, 497-98 (8th Cir. 1997), the "assets of a plan" clearly encompasses surplus assets.

Finally, it cannot be seriously disputed that the 1990 amendment used the assets of the plan for the "benefit" of Hughes. SG Br. at 22-23 (Hughes used the surplus to fund the non-contributory benefits). As the Ninth Circuit stated, Hughes used the asset surplus to fund benefits for employees who were never participants in the Contributory Plan: "Had Hughes not used the Contributory Plan surplus" for these labor costs, "Hughes would have had to use its own revenues . . . ." 105 F.3d at 1296. Discharging obligations to third parties constitutes consideration under contract law and income under tax law and

must be considered to be a "benefit" for the employer under ERISA §403. ERISA §302, 29 U.S.C. §1082, makes the benefit to Hughes unmistakable. This section of ERISA imposes funding obligations on plan sponsors. When Hughes diverted assets from the contributory plan to fund its obligations to non-contributing employees, Hughes discharged its funding obligation under ERISA and thus unmistakably benefited from the diversion.

Where the Petitioners appear to differ with the Ninth Circuit is on the meaning of two terms in §403: "inure" and "participants in the plan." Following the Second Circuit, the Ninth Circuit decided that inure means "to become of advantage." 105 F.3d 1292. See also *Webster's New Universal Unabridged Dictionary* (2d ed. 1979) (including in definition of "inure" "to come into use" or "to serve to the use or benefit of"). Petitioners offer no other definition. Petitioners appear to contend that assets must be withdrawn for inurement to occur, Pet. Br. at 26, but that argument finds no support in the statutory text or the common meaning of "inure." Moreover, the Ninth Circuit held that even if that was the standard, the Jacobson complaint could not be dismissed under Rule 12, because the plaintiffs alleged that the assets were withdrawn and transferred to a new non-contributory plan. 105 F.3d at 1295.

The Solicitor General nevertheless argues that the anti-inurement rule does not protect the Respondents because §403 does not distinguish between "participants" who make employee contributions and those who do not. The Solicitor concludes that there is "no way to differentiate between the incidental gains that Hughes receives from the payment of benefits and other legitimate advantages realized by employers when they make benefit payments." SG Br. at 25. The Solicitor's argument is analyti-

cally flawed. It fails to recognize that §403 provides that the assets shall be used for the exclusive benefit of the "participants in the plan." The "participants in the plan" were limited to those who made employee contributions. The Solicitor's approach would mean that use of the assets for any employees who the employer makes eligible suffices. SG Br. at 21 and 23. This approach diminishes or downgrades §403's protection of the "participants in the plan" in a manner that is reminiscent of the *cy pres* ("as nearly as" practicable) doctrine applicable to charitable trusts where it is impossible or impractical to achieve the trust's original purpose. But the *cy pres* doctrine is not applicable at all to private trusts, *Restatement (Second) of Trusts*, §399 comment a, and it was, moreover, not impossible or impracticable to achieve the original purpose here -- using the assets for the contributing employees' exclusive benefit.

The Ninth Circuit clearly and repeatedly stated, in slightly different ways, that the problem with Hughes' amendment is that it used the surplus for the benefit of "employees who were never participants in the Contributory Plan." 105 F.3d at 1293, 1294 and 1295. Remarkably, neither Hughes Aircraft nor the Solicitor General directly respond to this point or suggest how the reference to "participants in the plan" reasonably extends to employees who were never participants in the plan. To avoid the Ninth Circuit's point, Hughes goes as far as to imply misleadingly, in two places, that it only offered new benefits to individuals who were already participants: "Hughes had done nothing but amend the plan to provide new benefits for plan participants." Pet. Br. at 25; *id.* at 44 (Hughes did "no more than add new benefits for plan participants").

If this Court adopts Hughes' argument, the result will be that assets accumulated under a contributory plan will inure to

the benefit of the employer, rather than the participants in the plan, as those terms are ordinarily understood. ERISA §403's anti-inurement rule will be a cardboard tiger that only looks as if it offers protection to participants in the plan.

-If Hughes Aircraft was intent on reclaiming the part of the surplus that was attributable to Hughes' own contributions, ERISA §403(c)(1), 29 U.S.C. §1103(c)(1), contains an exception that allows Hughes Aircraft to do so. The conditions for that exception are that the plan be terminated and that the part of the surplus attributable to the employees' contributions be distributed to them under ERISA §4044(d), 29 U.S.C. §1344(d). The asset transfer rules in ERISA §208, 29 U.S.C. §1058, may also allow Hughes to take the portion of the surplus that accumulated as a result of Hughes' own contributions and use it to fund benefits for a non-contributory employee group without terminating the plan. But to do so, Hughes must preserve the portion of the surplus attributable to the employee contributions for those participants. Hughes Aircraft is not permitted to take the assets that are attributable to the employee contributions and use them as its own assets.

Thus, if the Court considers the anti-inurement issue (but see above), there can be no doubt that under the facts alleged by plaintiffs, the surplus assets of the Hughes plan have inured to the benefit of the employer and none of the exceptions to ERISA §403 apply. As the Ninth Circuit correctly pointed out, while Hughes "did not do anything so blatant" as to withdraw the funds from the contributory plan and deposit them in its corporate account, 105 F.3d at 1293, it used the funds from the contributory plan to finance its labor costs for participants who were never participants in the plan. Because this violated ERISA §403, dismissal under Rule 12(b)(6) is improper.

VI. The Equitable Remedies Available Under ERISA Include Constructive Trust and the Injunctive Power to Require that a Plan Be Terminated

Hughes seeks a ruling that the federal courts can never deem a pension plan to have terminated or order a plan terminated because it has become a wasting or dry trust.[14] The Court should not issue that ruling. Under the common law and ERISA, the courts have had the authority to order termination of trusts or employee benefit plans under various circumstances, including the following: to enforce contractual obligations (*American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574, 580-81 (3d Cir. 1995); *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990)); to replace the plan administrator or trustee by an independent fiduciary, such as a court-appointed bankruptcy trustee, who may order a termination (*In re Esco Mfg. Co.*, 50 F.3d 315 (5th Cir. 1995)); to close out an abandoned plan (*Chambers v. Kaleidoscope, Inc. Profit Sharing Plan*, 650 F. Supp. 359 (N.D. Ga. 1986)); where the trust's purpose can no longer be carried out (*Scott on Trusts*, §335 at p. 426; *Bogert*, §995 at p. 253); or where the plan has become a wasting trust (*In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1201-1205 (S.D. Tex. 1991), *aff'd sub nom. Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995)).

Here, the Ninth Circuit held that the district court, on a motion to dismiss, could not rule out that Hughes' Contributory Plan had become a wasting trust and should be ordered termi-

[14] If the plan is terminated, e.g., as a wasting trust, the surplus assets attributable to employee contributions must be distributed to the contributing participants. ERISA §4044(d)(3), 29 U.S.C. §1344(d)(3).

nated, rather than allowing the employer to continue to siphon its surplus. The Ninth Circuit held that "[o]nly after discovery can the district court properly determine whether the Contributory Plan's purposes have been accomplished and whether its liabilities are fixed enough to terminate the plan." 105 F.3d 1295 n. 3.

Hughes maintains that ERISA Title IV precludes a court from declaring a plan terminated or ordering an employer to terminate a plan because the plan has become a wasting trust or for any other reason.[15] As a matter of statutory construction, this position appears to be based only on the description of ERISA §4041, 29 U.S.C. §1341, as the "exclusive means" to terminate a plan (other than an involuntary termination by the PBGC pursuant to ERISA §4042), and a reference in the regulations to §4041 as a "voluntary" termination procedure. 29 C.F.R. 4041.3(a). From this scarce authority, Hughes comes up with a syllogism: A court cannot "order an employer to institute a 'voluntary' termination under section 1341; such a forced termination by definition would be <u>involuntary</u>." Pet. Br. at 40 (emph. in original).

The text of ERISA §4041 does not require, or even favor, a restriction on the historical equitable powers of the courts. To the contrary, the more reasonable and logical

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[15] The company-sponsored HARA, which appears as an *amicus* supporting Hughes, objects to termination of the Plan, but it does not articulate any interest that retirees have in allowing Hughes to continue to transfer the surplus earned by their contributions to Hughes to finance the benefits of non-contributing employees. The Solicitor General takes the position that the Court need not reach this issue. SG Brief at 16.

construction of the language is that Congress intended that §4041 be the exclusive procedure by which a plan adminisrator seeking to voluntarily terminate a plan may do so, but not to deprive the courts of the power to apply traditional trust law principles so as to require a plan to be terminated. The dictionary defines "means" as "that by which something is done or obtained." *Webster's New Universal Unabridged Dictionary; accord Black's Law Dictionary* ("[t]hat through which, or by which, or by the help of which, an end is obtained"). The means of termination must not be confused with the events that culminate in or necessitate termination. While the procedures of Title IV govern matters such as notification, priorities in distributing benefits, and the orderly close-out of defined benefit pension plans, Title IV is silent on the courts' equitable powers.

This is no accident. Congress intended that appropriate government agencies and the courts continue to address the substance and legality of termination. Thus, Congress asserted that a determination of "whether a proposed termination violates the contractual or statutory rights of any affected parties . . . must ultimately rest with the appropriate adjudicative entity, government agency, or court, as the case may be." H.R. Rep. 99-241, 293, *reprinted in* 1986 U.S.C.C.A.N. 579, 944. Given Congress' intent that Title IV's termination procedures not preclude the courts from ultimately determining whether termination should be allowed, it is not rational to believe that Congress intended for the Title IV procedures to preclude courts from declaring that terminations should be ordered or deemed to have occurred.

The appropriate judicial procedure is to allow the plaintiffs and Hughes Aircraft to present their evidence concerning whether the Retirement Plan has become a wasting trust

under traditional trust law principles. If the trial court finds that the plan has become a wasting trust that should be terminated, the court will determine the appropriate equitable relief for Hughes' earlier failure to distribute the surplus assets as required by ERISA §4044(d)(3).

Hughes' Brief sounds as if the only order that the plaintiffs seek is termination of the plan. In fact, the complaint requests a range of equitable remedies for Hughes' violations of ERISA and the terms of the Plan, including enjoining the defendants from using the assets for the purpose of paying benefits under the non-contributory plan, restoring assets previously used, equitably distributing excess assets attributable to employee contributions in the form of improved benefits, and appointment of an independent trustee -- in addition to ordering that the plan be terminated because it has become a wasting or dry trust.

The other remedies that the plaintiffs seek are not contested. *Mertens v. Hewitt Assoc.*, 508 U.S. 248 (1993), teaches that participants and beneficiaries have available the full range of equitable remedies applied by the courts of equity. *Id.* at 256. Among those remedies are the appointment of new fiduciaries and imposition of a constructive trust. A constructive trust may be imposed as a remedy for ERISA violations that unjustly enrich one donor at the expense of other contributors to a trust. See *Clothing & Textile Workers v. Murdock*, 861 F.2d 1406 (9th Cir. 1988); *Restatement of Restitution*, §160.[16]

[16] "A constructive trust is . . . the remedial device through which preference to self is made subordinate to loyalty to others." *Meinhard v. Salmon*, 249 N.Y. 458, 467, 164 N.E. 545 (1927).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 97-1287

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY;
HUGHES NON-BARGAINING RETIREMENT PLAN,
Petitioners,
v.

STANLEY I. JACOBSON; DANIEL P. WELSH;
ROBERT E. MCMILLIN; ERNEST O. BLANDIN;
RICHARD E. HOOK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T, RCA, AND BOEING EMPLOYEES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF OF AT&T, RCA, AND BOEING EMPLOYEES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

This brief is submitted by certain former employees of RCA Corporation and AT&T Corporation and the Seattle Professional Engineering Employees Association (jointly "Amici").[1] The Amici offer the Court concrete examples

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[1] Pursuant to Supreme Court Rule 37.6, this Brief was authored in its entirety by attorneys for Amici. The Amici are the only persons or entities who made a monetary contribution to the preparation and submission of this Brief. The consents of Petitioners and Respondents to this brief as amici curiae under Rule 37.3(a) have been filed with the Clerk.

of the dramatic and adverse effect of the rulings sought by Hughes on employee benefit plans and their participants and sponsors.

The RCA Employees are Plaintiffs-Appellants in *Brillinger v. GE*, 130 F.3d 61 (2d Cir. 1997). A petition for certiorari was filed on May 13, 1998, 66 USLW 3758 (US), and is pending as No. 97-1834. The claims in these cases relate to the disposition of residual assets of the RCA Pension Plan, estimated at $1,344,377,186 which are due in part to employee contributions. All of the assets of the RCA Pension Plan were taken by the GE Pension Plan in a plan merger without any distribution or adjustment to provide RCA Employees with the benefit of residual assets attributable to their employee contributions to the RCA Pension Plan.

The [former] AT&T Employees are Systems Council EM-3, I.B.E.W., and 17 individual plan participants who have filed a class action on behalf of over 16,000 current employees of Lucent Technologies formerly were employed by AT&T Corporation and union and management retirees assigned to Lucent, *Systems Council EM-3, I.B.E.W. v. AT&T Corporation*, 972 F. Supp. 21 (D.D.C. 1997). An appeal is pending as No. 97-7155 (D.D.C.) with oral argument scheduled for September 24, 1998. This case challenges the allocation of over $40 Billion in pension plan assets and some $3 Billion in assets of a welfare benefit plan (which is not regulated by ERISA except through fiduciary duty) by AT&T in a fashion which appears to favor AT&T. The District Court has held that AT&T's actions to allocate the $43 Billion in its favor are only a "plan amendment" under *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S.Ct. 1783 (1996) which is not susceptible to judicial review.

The Seattle Professional Engineering Employees Association ("SPEEA") is the collective bargaining representative for nearly 26,000 professional engineering and

technical employees at Boeing Company operations in seven states. SPEEA represents employees at The Boeing Company who are currently covered by a defined-benefit retirement pension plan, including employees who have worked at other aerospace firms under contributory retirement plans. The current uncertainty in the aerospace industry and recent experience with use of $100 million of pension fund assets to offset the cost of acquisition of Rockwell International's defense electronics unit has led Boeing employees to rethink their retirement plan structure. SPEEA and its members are deeply concerned about a possible ruling that employer actions to control and dispose of pension plan assets in plan reorganizations are not subject to reasonable fiduciary obligations.

SUMMARY OF ARGUMENT

Hughes and its amici argue that an employer's power to "amend" an employee benefit plan allows it to make a complete change in the plan's benefit structure, beneficiaries and source of financing without any obligation to employees who have contributed to the plan based on this Court's decision in *Lockheed Corporation v. Spink*, 517 U.S. 882, 116 S.Ct. 1783 (1996). This is a perverse reading of *Lockheed* whose basic point is that ERISA does not disturb the rights of "settlors" to a trust at common law.

A "settlor" is a person who has contributed property to a trust. At common law, any surplus in a trust—namely trust assets in excess of amounts reasonably required to meet its defined liabilities—is divided among all contributors in proportion to their contributions. A similar rule is codified for ERISA pension trusts through 29 U.S.C. §§ 1344(d)(3), 1058 for express application in any termination, merger or transfer of assets and liabilities between pension plans. The common law rules governing both surplus and allocation of assets in an organic change of a trust remain in place through the fiduciary provisions of ERISA for assets of employee welfare benefit plans.

An employer's power to "amend" an employee benefit plan is simply a codification of its common law power to amend a "unilateral contract" for employee benefits with its employees. ERISA has changed the unsecured nature of the common law benefit promise by interposing a trust which accumulates assets in advance of the time for payment of "deferred compensation" in the form of a pension. It is the trust—rather than the employer—which is liable for actual payment of benefits to the employees. The employer's contractual power to amend its offer of benefits to employees does not include a power to exercise the powers of the trustee over plan assets and invade the corpus of the trust for its own purposes.

The fact that an employer action is an "amendment" of a plan does not exclude simultaneous classification of the transaction as a termination, merger or transfer of assets or liabilities of a plan. In these situations, 29 U.S.C. §§ 1058, 1344(d)(3) give the employee "shareholders" of a contributory pension trust an appraisal remedy through a valuation and allocation of plan assets and any surplus. These rules reflect the intent of Congress, *H.R. Rep.* 100-391, p. 130, reprinted [1987] U.S. Code Cong. & Adm. News at 2313-105, that "employees will virtually always receive a distribution of assets from [the surplus] of a plan to which they have contributed."

ERISA provides that money allocable to an employee on termination of a pension plan, including a portion of any surplus attributable to his contributions, will either be distributed to the employee (in a termination) or follow him into any new plan (in the case of a merger or transfer), without loss or dilution as "security" for payment to the employee. The fiduciary rules provide a *pro rata* distribution of assets in proportion to liabilities, as at common law, in the case of a welfare plan.

The experiences of the Amici offer concrete examples of the dangers in a holding that *Lockheed* gives employers

carte blanche in dealing with benefit plan assets. The AT&T Employees negotiated a retiree medical trust which had only $2.985 Billion in assets to cover some of $9.125 Billion in liabilities at the time of the spin-off of Lucent Technologies. A District Court has concluded that *Lockheed Corp. v. Spink* allows AT&T to keep all $3 Billion of trust assets while imposing over $6.3 Billion in liabilities with no assets on Lucent. In a simple version of rulings in General Electric cases, GE acquired RCA which had a contributory pension plan with assets of $2.82 Billion and plan liabilities of only $1.47 Billion. This left a surplus of $1.34 Billion of which $336 Million was allocable to employee contributions in a termination. Instead of terminating the plan, GE sold the RCA operations and employees but only transferred assets equal to the cost of basic benefits of $1.47 Billion to the buyer's pension plan. GE now can terminate the remaining plan (which has no participants) and take the entire surplus for itself. In a variant of this option, GE merged the RCA plan into its larger plan, diluted the employees' share down from $336 Million to $30 Million overnight and used the difference to fund its own obligations to GE employees without ever contributing a dime to the RCA Plan. If ERISA condones such common law fraud and allows employers to invade an ERISA trust and reallocate its assets at will in a plan reorganization, the "security" of trust assets which is promised by the very title of the statute—the Employee Retirement Income Security Act—is illusory.

ARGUMENT

Petitioner Hughes Aircraft seeks a determination from the Court that an employer may use residual assets of a pension plan attributable to employee contributions as it wishes and with no possible judicial review as long as it titles its document "Plan Amendment" and does not file a notice of termination with the Pension Benefit Guaranty Corporation ("PBGC"). If Hughes is correct, employees will never have a claim for relief or judicial oversight of

the use or abuse of the nation's $2 *Trillion* in pension assets which is the "biggest lump of money in the world," *H.R. Rpt. 100-391*, reprinted in [1987] U.S. Code Cong. & Admin. News at 2313-129. The purpose of this Brief is to focus on the far-ranging effects of Hughes' arguments on benefit plan reorganizations which follow from corporate mergers and acquisitions.

I. *LOCKHEED CORPORATION v. SPINK* DOES NOT ADDRESS THE DISPUTE BETWEEN MULTIPLE SETTLORS—EMPLOYER AND EMPLOYEES—IN THIS CASE AND, IF ANYTHING, RESOLVES THE CASE IN FAVOR OF THE EMPLOYEES UNDER THE COMMON LAW RIGHTS OF SETTLORS

Hughes sweeps with a broad brush in seeking to dismiss claims for lack of a fiduciary duty in reliance on *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783 (1996). *Lockheed* involved an action by an employee seeking to overturn a contract offer by Lockheed which conditioned Spink's right to retire early on a waiver of any employment claims against Lockheed, *Lockheed*, 517 U.S. at 885, 116 S. Ct. at 1787. The Court concluded that "Lockheed acted not as a fiduciary but as a settlor when it amended the terms of the plan to include the retirement programs [offered to Spink]" as the threshold decision to provide employees benefits is not governed by ERISA, *Lockheed*, 517 U.S. at 891, 116 S. Ct. at 1790. With respect to 29 U.S.C. § 1106(a)(1)(D), the Court then noted that the language of the section, ". . . does not in direct terms include the payment of benefits to a plan participant by a plan administrator" as a prohibited transfer or use of plan assets, *Lockheed*, 517 U.S. at 892, 116 S. Ct. at 1790.

Lockheed Corp. v. Spink rests on the basic point that ERISA does not disturb the rights of "settlors" to a trust at common law. Indeed, there is nothing in ERISA on the rights of settlors beyond a procedural requirement that "[e]very employee benefit plan shall— . . . (3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan. . .," 29 U.S.C. § 1102(b)(3). Neither this language nor the definition of a "plan sponsor" in 29 U.S.C. § 1002(16)(B) confer any express power on an employer.

On matters not explicitly governed by ERISA, the courts follow the Congressional direction to apply ". . . principles developed in the evolution of the law of trusts. . ." to create a federal common law of employee benefits, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110, 109 S.Ct. 948, 954 (1989) quoting *H.R. Report 93-533*, p. 11 (1973) reprinted [1974] U.S. Code Cong. & Adm. News 4639, 4649. "The courts apply these common law trust standards 'bearing in mind the special nature and purpose of employee benefit plans.'" *Varity Corp. v. Howe*, 516 U.S. 489, 506, 116 S. Ct. 1065, 1075 (1996), quoting *H.R. Conf. Rep.* No. 93-1280, p. 302, reprinted, 3 Leg. Hist. of ERISA 4569 (GPO 1976). These concepts apply to the federal common law rights of settlors under ERISA.

The fundamental distinction in purpose and economics between the traditional gratuitous common law trust and an employee benefit plan is the contractual nature of the employee benefit plan, *Collins v. UMWA Funds*, 298 F. Supp. 964, 967 (D.D.C. 1969); *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 240, 98 S. Ct. 2716, 2720 (1980) (state legislation affecting pension trust impairs contract between employer and employee); *Coe v. Washington Mills*, 149 Mass. 543, 547, 21 N.E. 966 (1889) (employee sick and relief fund akin to private insurance contract and not a charity); *Shenango Pottery Workers Association v. Crawford*, 59 D&C 426, 430 (Pa. Comm. Pleas 1942) (similar on employee association assets). The Court thus has noted, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 148, 105 S. Ct. 3085, 3093 (1985), that ERISA was designed to protect these "contractually defined benefit expectations" within the framework of the law of trusts.

A "settlor" is a person who contributes property to a trust, Bogert & Bogert, *The Law of Trusts and Trustees,* §§ 41, 43, pp. 428, 438-439 (rvsd. 2d ed. 1984) ("*Bogert*"). In this case, the pension trust has received contributions of property from the employees (at all times from 1953 to 1991 or beyond) as well as the employer, Hughes (until 1986).

The common law recognizes a resulting trust in favor of the grantor when assets already in trust exceed the amount needed to insure payment of its designated liabilities, *Wilson v. Bluefield Supply Co.*, 819 F.2d 457, 464 (4th Cir. 1987); *Restatement (Second) Trusts,* § 430, p. 378 (ALI 1959); *Bogert,* § 469, p. 450. Where there are several donors, the trustee holds a surplus for all contributors in proportion to their contributions, *Restatement,* § 430, p. 381, Comment j; § 432, p. 387, Comment d; V Scott & Fratcher, *The Law of Trusts,* § 430.3, p. 111, § 430.4, p. 113, § 432, p. 129 (4th Ed. 1986) ("*Scott*"); *Coe,* 149 Mass at 549, 21 N.E. at 967; *Colonial Trust Company v. Comm'r,* 111 F.2d 740, 742 (2d Cir. 1940); *Rehder v. Rankin,* 249 Iowa 1201, 1205, 1207, 91 N.W.2d 399, 402 (1958). The allocation is done in proportion to contributions, regardless of the time they were made, *Restatement,* § 432, p. 387, Comment d. See also, *Restatement* §§ 433, 434, 435, p. 388-389 (in contractual trust, surplus goes to the person providing the consideration for the transfer in trust); V *Scott,* §§ 433-435, pp. 130-132 (same). The only exception is that money received after the trustee knows that the trust has adequate assets to perform its function is returned to such contributors on a priority basis, *Restatement,* § 432, p. 387, Comment d; V *Scott,* § 430.3, p. 113. In this case, the Hughes pension trust has been overfunded since 1986 although employee contributions continued.

Coe v. Washington Mills, 149 Mass. at 544-545, 21 N.E. at 966-967, dealt with a sick and relief fund which

was funded by both employer and employee contributions. The court was asked to divide residual assets between conflicting claims of the company and a charity designated by the employees for their share of the surplus. The employer sought to retain assets attributable to employee contributions and rested its claim on its express power under the trust ". . . to decide points of dispute and manage the internal affairs of the [trust]," *Coe,* 149 Mass. at 550, 21 N.E. at 967. The court held that this power did not extend so far as to allow the employer to decide the "disposal of the funds," *id.* The court held that the employee contributions to the fund created a contractual arrangement which gave the employees as well as the employers a right to the residue in the resulting trust, *Coe,* 149 Mass. at 547-549, 21 N.E. at 967. The Congressional designation of "disposition" of plan assets as a fiduciary function, 29 U.S.C. § 1002(21)(A)(i), requires a similar rule in any organic or fundamental reorganization of an ERISA trust.

The common law went further to require unanimous consent to any alternative disposition of funds. *Shenango Pottery Workers,* 59 D&C at 426, 427, 428, involved an association formed as a social club for employees which was left with a residue of assets when it dissolved as a result of a change in membership. The court held that no one had authority to vote away the property of another contributor, *Shenango,* 59 D&C at 431, 432. As the enterprise was not charitable, its property belonged to its members in proportion to their contributions absent unanimous consent to "disposing" of it to another group or purpose, *Shenango,* 59 D&C at 430, 431, 432. *Flint v. Codman,* 247 Mass. 463, 142 N.E. 256 (1924), applied the same rule to enjoin the sale of assets of a Massachusetts business trust—a common law entity comparable to a contractual employee benefit plan—despite the vote of the majority of the trust beneficiaries to sell the assets of the trust in good faith and for fair and reasonable value.

II. ERISA GIVES EMPLOYEE "SHAREHOLDERS" IN A CONTRIBUTORY PENSION PLAN AN APPRAISAL REMEDY IN A TERMINATION, MERGER OR TRANSFER OF ASSETS OR LIABILITIES

In its careful surgery on the common law, Congress chose to accept the suggestion of *Bogert*, § 247, p. 229, to apply corporate and contractual concepts to contractual business trusts—such as ERISA plans—to modify the common law. ERISA's allowance for an amendment procedure which vests all "voting" power in an employer eliminates the common law requirement for unanimous consent of all contributors to an organic change in a benefit plan. This is consistent with the rights of employers at common law to amend a "unilateral contract" with employees with respect to employee benefits. See generally, Private Pension Plans: Construction of Provision Authorizing Employer To Terminate or Modify Plan, 46 A.L.R. 3d 464. The power to amend a contract for future work or benefits does not include nor imply additional power over assets already committed to the legal control of a trustee upon reorganization of a benefit trust under the common law or ERISA.

A. 29 U.S.C. § 1344(d)(3) Protects Employee Claims To The Fruits Of Their Contributions On Termination Of A Defined Benefit Pension Plan.

The counterbalance to an employer's "voting" control in ERISA plans is an appraisal remedy, similar to that normally given to dissenting or minority shareholders in a corporate reorganization, with respect to their interest in the enterprise. See, *Kademian v. Ladish Company*, 792 F.2d 614, 628-629 (7th Cir. 1986) (appraisal remedy is "the *quid pro quo* for statute giving the majority the right to override the veto which previously the holder of even one share could exercise against mergers, sales of all assets, and other basic corporate changes"). ERISA requires that promised pension benefits be funded through a separate trust which accmumulates assets—beyond the control of the employer—and pays benefits to the employees, 29 U.S.C. § 1103(a). The security provided by this trust is then protected through an appraisal and allocation of its assets upon a fundamental change in the plan.

It is a truism that the day-to-day operation of a defined benefit plan is done on a pooled basis for all employees through a group trust over a period of years, 29 U.S.C. §§ 1081, 1082(b), (c), so that assets are not segregated or allocated to any particular individual employee or benefit, *Johnson v. Georgia Pacific Corp.*, 19 F.3d 1184, 1189-1190 (7th Cir. 1994). *Lockheed* and *Johnson* both involved single, ongoing and solvent pension plans with no organic changes in the participant group or financing of the pension enterprise to go beyond this basic concept.

A plan termination is however ~~an~~ exception to the normal rule for 29 U.S.C. § 1344(a) directs that '. . . the plan administrator shall allocate the assets of the plan . . . among the participants and beneficiaries of the plan . . ." upon termination. The statute gives priority to six categores of payments to employees under the written terms of the pension plan, 29 U.S.C. § 1344(a)(1)-(6). See also, *Mead Corp. v. Tilley*, 490 U.S. 714, 717, 109 S. Ct. 2156, 2159 (1989) (§ 1344 "requires that plan assets be distributed to participants" in priority). In a contributory plan, 29 U.S.C. § 1344(d)(3) requires that any assets remaining after the purchase of annuities for "benefits under the [terms of the] plan," 29 U.S.C. § 1344 (a)(6), must be divided between the employer and employees in rough proportion to their contributions.[2]

[2] The fraction in 29 U.S.C. § 1344(d)(3) is an actuarial shortcut designed to estimate proportionate contributions and provide "rough justice" using readily available data and standard calculations in any termination allocation. The numerator is the current value of employee contributions under 29 U.S.C. § 1344(a)(2) with interest at 5% through December 22, 1987, 29 U.S.C. § 1054(c)(2)(C)(iii) (1976) (obsolete) and 120% of the federal mid-term rate thereafter, 29 U.S.C. § 1054(c)(2)(C)(ii)(I); 26 U.S.C. § 1274. The denominator estimates total contributions to the plan as being equal

The purpose of 29 U.S.C. § 1344(d)(3) is to assure that there will "virtually always be a distribution to participants and beneficiaries" from residual assets of a pension plan to which they have contributed on a plan termination, *H.R. Report 100-391*, p. 130 reprinted at [1987] U.S. Code Cong. & Admin. News at 2313-104. 29 U.S.C. § 1344(d)(3) is indeed part of a "great compromise," Brief of Petitioners, p. 11, which gives the employer the benefit of gain on employee contributions in an ongoing plan while protecting the employees against use of gains attributable to employee contributions to pay benefits to a different plan or group of employees when the plan undergoes a fundamental change.

29 U.S.C. § 1344(d)(3) was enacted for the specific purpose of overriding *LLC Corp. v. PBGC*, 703 F.2d 301 (8th Cir. 1983), which accepted the argument—reiterated in new clothes by Hughes and its amici—that the existence of *some* funding exposure for an employer in a contributory plan gives the employer a right to *all* residual assets, *Holland v. Valhi, Inc.*, 22 F.3d 968, 978 (10th Cir. 1994), quoting *H.R. Rep. 100-391(1)*, p. 130, reprinted [1987] U.S. Code Cong. & Admin. News at 2313-105 (complete reversion allowed by LLC never intended) An original legislative proposal for the pension asset allocation rules gave first priority to employee contributions and *actual* investment earnings on such contributions, *Bridgestone/Firestone, Inc. v. PBGC*, 892 F.2d 105, 109-110 (D.C. Cir. 1989) (reviewing legislative history and intent). The final version, however, limited the priority investment credit under 29 U.S.C. § 1344(a)(2) to a safe (Treasury) rate of return, *id.*; Brief of Petitioners, p. 30; see n.2, *supra*.[3] This final legislative compromise thus placed both participants and the employer in a subordinated position with respect to investment earnings over a safe investment return (i.e., Treasuries), see n.2, *supra*, to assure priority payment of basic benefits promised by the plan document.

to the present value of the total liability for accrued benefit promised by the terms of the plan. This credits employer contributions, which are actuarially determined from ultimate benefit liabilities under 29 U.S.C. § 1082, with "interest" at Treasury or comparable rates in reverse by discounting future benefit payments to the present at such rates to match apples to apples. See, 26 U.S.C. § 417(e) (use of Treasury rate to discount annuity rights to present in calculating lump sum benefit values). For a variety of reasons including reduced employer funding from investment gains, the formula often produces an employee share far below an actual accounting. See, *Bridgestone/Firestone Inc. v. PBGC*, 892 F.2d 105, 108 n.3 (D.C. Cir. 1989) ($8.1 Million employee share under statutory formula versus $79.2 Million by an actual accounting).

Hughes and its *amici* all ignore the statutory definition of a "defined benefit plan" as "[any] pension plan other than an individual account plan," 29 U.S.C. § 1002(35). The category thus is not limited to the traditional plan providing a "fixed" retirement annuity. It instead broadly encompasses any plan which does not satisfy the definition of an "individual account plan" or "defined contribution plan" as ". . . a pension plan which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." 29 U.S.C. § 1002(34) (emphasis supplied). As a result of the statutory definition, any element of an employer guarantee or a promise of payment which varies from the actual market value of an individual account will legally transform a plan into a "defined benefit" plan. The "guarantee" need be no more than the traditional insurance guarantee of recovery of principal over a 20 or 30-year period or minimal interest which is economically

[3] The priority is based on the fact that employees already have paid taxes on their contributions. See, *Braniff Airways, Inc. v. Bankers Trust Co. (In Re: Braniff Airways, Inc.)*, 27 B.R. 222, 229 (Bankr. N.D. Tex. 1982) (denying priority under 29 U.S.C. § 1344(a)(2) to pre-tax contributions by company despite denomination as "employee contributions" in plan document).

meaningless. C.f. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 209 n.12, 87 S.Ct. 1557, 1561 n.12 (1967) (insurer's "guarantee" set so low that never triggered); *Peoria Union Stock Yards Retmt. Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 324-325 (7th Cir. 1983) (same for pension insurance contract). While the definition is entirely qualitative in assigning any plan with any legal element of employer risk to the defined benefit category, ERISA shows Congressional sensitivity to the *quantity* as well as the *quality* of employer risk.

The presence of employee contributions alters the underlying legal and economic assumptions about a defined benefit plan to create a hybrid form. Employee contributions minimize and may even eliminate the need for substantial employer contributions—as indeed appears to have happened in the Hughes Plan. As employee contributions are regular and not dependent on current actuarial computations of funding needs, they also limit the volatility of employer contribution obligations. Ongoing employee contributions and investment gains on those contributions in good markets certainly reduce the risk that a pension fund will suddenly develop unfunded liability in a drop in the stock markets and trigger a need for large and immediate employer contributions. The willingness of employees to participate in this program and their confidence in the basic system is destroyed if they are not assured that the fruits of their contributions and investment are protected against loss.

The presence of employee contributions creates a right to a minimum pension benefit, 29 U.S.C. § 1054(c), Brief of United States, p. 4, in marked contrast to the general ERISA rule. The "minimum benefit" is stated in terms of a lump sum account equal to employee's contributions plus safe interest at 5% through 1987 and thereafter a Treasury rates, 29 U.S.C. § 1054(c)(2)(C) (definition of "accumulated contributions" account); See also, n.2 (safe interest on employer contributions).

This lump sum value is only converted into a "fixed" minimum annuity benefit to be provided by the plan under a statutory formula, 29 U.S.C. §§ 1054(c)(2)(B), (c)(3), 1055(g)(3). The same "account balance" is used to define the employee's rights based on his contributions on termination of a defined benefit plan, 29 C.F.R. §§ 4044.11(b), 4044.12(b). *Borst v. Chevron*, 36 F.3d 1308, 1315 (5th Cir. 1994) correctly closed the circle with its observation that "ERISA [through 29 U.S.C. § 1344(d)(3)] markedly distinguishes between [residual assets] attributable to employer contributions and those attributable to employee contributions."[4] These statutory provisions all highlight a Congressional intent to track and give employees the fruits of their "investment" in the pension contract. They foreclose the idea that Congress somehow implicitly repealed the common law to allow employers to use employee money with impunity.

B. 29 U.S.C. § 1058 Provides Parallel Protection Of Employee Claims To Residual Assets Attributable To Their Contributions In A Pension Plan Merger Or Transfer Before They Are Used To Cover Other Pension Debts Of An Employer

The factual question of whether the *Hughes* transaction involved one or two plans resolves the remaining issues presented in the case. If there are two plans, then Hughes' use of assets of the 1953 Plan for the new 1991 Plan violates the prohibition against inurement which allows pension plan assets to be used *only* for "the "exclusive purposes of providing benefits to participants *in the [1953] plan* . . . and defraying reasonable expenses of administering the plan," 29 U.S.C. § 1103(c)(1). "Whether a [separate] plan exists within the meaning of ERISA is a 'question of fact' . . ." for the courts, *Deibler v. UFCW Local 23*, 973 F.2d 206, 209 (3d Cir. 1992) (quoting

[4] The Fifth Circuit carefully noted that it was not addressing a contributory plan, *Borst*, 36 F.3d at 1313 n.6 (issues on contributory CRP and SAP Plan were settled and not before court).

Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990), in light of the complete change in core plan features involving "intended benefits, beneficiaries [and the] source of financing," *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1992) (en banc), in the Hughes transaction.

The existence of two plans directly implicates claims under 29 U.S.C. § 1058 which the District Court foreclosed in denying leave to amend. 29 U.S.C. § 1058 provides:

> A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated).

Kinek v. Paramount Communications, 22 F.3d 503, 509, 511 (2d Cir. 1994) held that the language of 29 U.S.C. §1058 provides "unambiguously that plan participants are entitled, . . ., to exactly what they would have received in the event of an actual termination" and nothing less in a merger, consolidation or transfer of assets or liabilities between pension plans.

The term "amendment" simply means change. The IRS defines a plan "amendment" to encompass—rather than being mutually exclusive of—other characterizations of a transaction. See IRS Regulation [26 C.F.R.] 1.411(d)-4 Q&A2(a)(3)(i) ("[t]he prohibition against the elimination of . . . [accrued benefit promises by plan amendment under 26 U.S.C. §411(a)(6) and 29 U.S.C. § 1054(g)] . . . applies to plan mergers, spinoffs, transfers and transactions amending or having the effect of amending a plan to transfer benefits"). *C.f. Comm'r v. Court Holding Company*, 324 U.S. 331, 334, 65 S.Ct. 707,

708 (1945) (transaction treated as a sale based on its substance notwithstanding the absence of a sales agreement); *Minnesota Tea Company v. Helvering*, 302 U.S. 609, 613, 58 S.Ct. 393, 394 (1938) ("a given result at the end of a straight path is not made a different result because reached by following a devious path"). If transactions of the *Hughes* variety are subject to 29 U.S.C. § 1058 with the same protection of employee interests as a formal termination, the issues presented by Hughes have little importance for future cases.

A "transfer" within the meaning of 29 U.S.C. § 1058 (and its counterpart in the Internal Revenue Code, 26 U.S.C. § 414(1)) occurs whenever there is a reduction in the assets or liabilities of one plan and corresponding increase in the assets or liabilities of another plan and expressly includes transfers of employees between plans, I.R.S. Regulation [26 C.F.R.] 1.414(1)-1(b)(3) ("Transfer of Assets or Liabilities").[5] *Jacobson v. Hughes Aircraft Co.*, 105 F.3d 1288, 1291, 1306 (9th Cir. 1997) notes that Hughes gave its employees a one-time choice between the "Contributory Plan" and "Non-Contributory Plan" which falls squarely within this definition.

Judges Cudahy, Posner and Brown of the Seventh Circuit concluded that a plan "amendment" to change its benefit structure and financing can also be a "merger" or "transfer" which is subject to 29 U.S.C. § 1058 in *Hickerson v. Velsicol Chemical*, 778 F.2d 365, 378 (7th Cir.

[5] 26 U.S.C. § 414(1) is the parallel in the Internal Revenue Code to 29 U.S.C. § 1058. The regulations were adopted in 1979 and have become obsolete in part as a result of subsequent legislation, including the 1987 amendments to ERISA in 29 U.S.C. § 1344(d)(3). See, e.g., Rev. Rul. 86-48, 1986-1 C.B. 216, and Rev. Rul. 85-6, 1985-1 C.B. 133 (contingent benefit obligations protected by 1984 amendments in 29 U.S.C. § 1054(g)(2) and 26 U.S.C. § 411(d)(6) must be valued and protected under 26 U.S.C. § 414(1) and 29 U.S.C. § 1058 despite language of regulations protecting only "accrued benefits.")

1985). In *Hickerson,* 778 F.2d at 367, 373-374, 378-379, the Seventh Circuit treated an "amendment" of a defined contribution plan (in which all investment earnings go to employees) to convert it into a defined benefit plan as a sequential transaction involving the establishment of a new plan followed by a merger of the old and new plans.

The employer in *Hickerson* sought to use a formula using an excessively low interest rate to minimize employee interests and maximize the offset to its funding obligation while the employees sought to have the benefit of the better of actual future investment returns or the new defined benefit, *Hickerson,* 778 F.2d at 372, 377. The Seventh Circuit concluded that ". . . ERISA allows plan amendment. But it is a different matter to permit this flexibility to become the basis for . . . changes [in a plan] in an attempt to generate a windfall." *Hickerson,* 778 F.2d at 377. It prevented a windfall on either side by requiring the plan to appraise its assets at market value and provide a minimum benefit based on the annuity which could be purchased in the market with the employees' money as if the plan had terminated at the time of the "amendment," *Hickerson,* 778 F.2d at 379. The same relief is both feasible and necessary here to prevent a windfall to Hughes and employees who have never contributed to the pension plan.

A merger is defined by 26 C.F.R. § 1.414(l)-1(b)(2), (1) only in circular terms as the ultimate legal result of a traditional corporate merger—an assumption of all liabilities and assets by a single entity. See, *Hickerson,* 778 F.2d at 374 (so noting). As in *Hickerson,* Hughes' plan "amendment" might also properly be characterized as a two-step transaction, involving the establishment of a new Non-Contributory Plan which then was merged with the existing Contributory Plan in a transaction subject to 29 U.S.C. § 1058.

29 U.S.C. § 1058 works in a defined benefit plan by applying the asset allocation rules of 29 U.S.C. § 1344 to impose a "snapshot" of the funding level of each plan at the date of merger or transfer and allocating (otherwise unallocated) assets of a defined benefit pension plan to payments due to individual employees. The "snapshot" under 29 U.S.C. §§ 1058, 1344 translates the inchoate and allocated interest of an employee in an ongoing defined benefit plan into a specific dollar amount. This "snapshot" requires valuation of available assets at current market value, *John Blair Communications, Inc. Profit-Sharing Plan v. Telemundo Group, Inc. Profit-Sharing Plan,* 26 F.3d 360, 364-367 (2d Cir. 1994). These assets are then applied to the "market" value of benefit liabilities (in the form of annuity costs) in the priority order of 29 U.S.C. § 1344 until assets are exhausted.[6] The end

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[6] In a defined benefit plan, the value of benefits ". . . is determined based upon actuarial assumptions about a number of *future* events, such as rates of return on investments, the benefit commencement date, future earnings, and participant mortality, among other things." *Vinson & Elkins v. Comm'r,* 99 T.C. 9, 13 (Tax Ct. 1992), *aff'd,* 7 F.3d 1235 (5th Cir. 1993) (emphasis supplied); *Mead Corp.,* 490 U.S. at 717, 109 S.Ct. at 2159. The relevant "market" for evaluating the aggregate effect of these factors and valuing a future payment stream is the commercial annuity market. See 29 U.S.C. § 1341(a)(3)(A) (annuity requirement in termination); *Hoefel v. Atlas Tack Corporation,* 582 F.2d 1, 7 (1st Cir. 1978) (damages for failure to pay pension benefits equal cost of commercial annuity); *Hickerson,* 778 F.2d at 379, n.22 (use of annuity costs to value benefits in pension transfer process). Annuity costs may be determined by an actual commercial annuity quote at the relevant calculation date, 29 C.F.R. § 4044.71, or standardized assumptions issued periodically by PBGC based on a survey of the commercial annuity market, 29 C.F.R. § 4044.41(a). See, Proposed Rules, Part 2619, Valuation of Benefits in Non-Multiemployer Plans, 51 Fed. Reg. 10334 (March 25, 1986) (survey produces results "within a few percent of the cost of commercial annuities"); Notice, PBGC (Survey of Nonparticipating Single Premium Group Annuity Rates), 61 Fed. Reg. 36771 (July 12, 1996) (description of survey process).

result is a simple and objective rule that "money follows the participant" in a reorganization of a pension plan.

The "benefit" protected by the 29 U.S.C. § 1058 "snapshot" in a merger or transfer is a lump sum cash value defined by an allocation of assets, *Gillis v. Hoechst Celanese*, 4 F.3d 1137, 1149-50 (3d Cir. 1993) (29 U.S.C. § 1058 incorporates the rules of 29 U.S.C. § 1344 on allocation of assets in a plan termination to assure that the level of benefit security provided by plan assets is not reduced).[7] There is no guarantee that the allocated assets actually will buy an annuity for the full retirement benefits promised to the participant by the employer. See, e.g., *Steelworkers Local 2116 v. Cyclops Corporation*, 860 F.2d 189, 200 (6th Cir. 1988) (assets ran out in 29 U.S.C. § 1344(a)(3) priority); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Benefits Committee*, 953 F.2d 587, 591-592 (11th Cir. 1992) (assets exhausted before 29 U.S.C. § 1344(a)(6) category). On the con-

[7] The argument that the term "benefit" in 29 U.S.C. § 1059 was really meant to apply only to the naked promise of an "accrued benefit" rather than the security for payment of that benefit through allocated plan assets has multiple defects. Congress has specifically defined the term "accrued benefit" in 29 U.S.C. § 1002(23)(A) to refer to the naked benefit promise—whether or not funded. It has then used this term throughout the statute when it wished to refer to the bare promise (as opposed to its funding status or security for payment) including separate protection of the benefit promise against change in a merger or transfer through the separate rules of 26 U.S.C. § 411(d)(6) and 29 U.S.C. § 1054(g). These provisions and the limitation of 29 U.S.C. § 1344(a)(6) to "benefits under the plan" are superfluous if the word "benefit" in 29 U.S.C. § 1058 excludes statutory rights apart from the "accrued benefit." *See Mead Corp.*, 490 U.S. at 722-723, 109 S.Ct. at 2162 ("under the plan" modifier limits priority to contractual plan benefits). While Hughes benefits, sponsors of underfunded plans would be hurt as they would be required to fund all promised benefits under the plan—in order to make sure that each employee would receive his full "accrued benefit" if the plan terminated immediately after the merger or transfer—as a condition to any merger or transfer of an underfunded plan under Hughes' approach.

verse side, the plain language and purpose of 29 U.S.C. §§ 1058, 1344(d)(3) give the employee an appraisal right to the fruits of investment of his contributions when assets run past the priority for "benefits under the plan" in 29 U.S.C. § 1344(a)(6) before that money is used to cover an employer's liability to a different group of participants in another plan through a merger or transfer.

Hickerson and *Jacobson* are not alone in protecting employee claims in mergers or transfers before a formal plan termination. The consensus view of the ABA Employee Benefits Section, (Sacher, et al. Eds), *Employee Benefits Law*, pp. 177-178 (ABA 1991), considered it obvious that ERISA requires that residual assets attributable to employee contributions must follow the employees in a pension plan transfer or merger. *Kinek* followed the same path as the ABA. In *John Blair*, 26 F.3d at 365, the Second Circuit held that 29 U.S.C. § 1058 prevented an employer from "pocketing" investment gain attributable to the assets of a transferred defined contribution plan for itself and its employees. *Holland*, 22 F.3d at 973, rejected a convoluted spinoff followed by an immediate termination which sought to reduce employee claims to .0015% of residual assets even though employees had contributed roughly 25% of the total contributions to the plan.

An illustration by combining the facts of *Brillinger v. GE*, 130 F.3d 61 (2d Cir. 1997) and the sale of GE Aerospace which is at issue in *Flanigan v. GE*, No. 3:93 CV 516 (D.Conn.) shows the evasion of 29 U.S.C. § 1344(d)(3) which results in the absence of a full allocation of assets in a plan transfer or spin-off. Assume that GE acquired RCA with an RCA plan with $1,468,-009,771 in basic benefit obligations under plan terms and $2,812,386,947 in assets, GE then sells all of RCA's business and employees to Thomson Consumer Electronic or, in *Flanigan*, Lockheed. If "surplus" does not have to be allocated in a transfer, GE can transfer all of the

employees and retirees to a new Thomson or Lockheed pension plan along with only $1,468,009,771 in assets for basic benefit obligations. The RCA plan would remain in GE's hands with $1,344,377,176 in residual assets and no liabilities. Using the "spinoff/termination" technique from *Holland*, 22 F.3d at 970 n.3, GE would then terminate the RCA Plan and take a reversion of the entire surplus, including assets attributable to employee contributions. Employees would never see the gain on their contributions as GE, despite the requirements of 29 U.S.C. § 1344(d)(3) and condemnation of *John Blair*, 26 F.3d at 365, "[pocketed] the difference which rightly belong[ed] to the . . . [employees]" for its own direct use and benefit.

Section 1058 also imposes "anti-dilution obligations" in a merger, *Malia v. Gen. Electric Co.*, 23 F.3d 828, 833 (3d Cir. 1994). In a simplified version of *Brillinger*, the RCA plan had $1,468,009,771 in basic benefit obligations under plan terms and $2,812,386,947 in assets when it was merged into a much larger GE plan which had benefit liabilities of some $15 billion and assets of roughly the same amount. If employee contribution benefits under 29 U.S.C. § 1344(a)(2) for the RCA Plan before the merger equaled 25% of total basic plan benefits of $1,468,009,771 or $367,002,443, the employees' share of residual assets of the RCA Plan under 29 U.S.C. § 1344(d)(3) before the merger would be as follows:

$$\frac{\$367{,}002{,}443 \quad [25\% \text{ of total liabilities of } \$1{,}468{,}009{,}771]}{\$1{,}468{,}009{,}771 \quad [\text{RCA Plan basic benefit liabilities}]}$$

The employees would then have been entitled to 25% of the residual assets of $1,344,377,186 or $336,094,297. Without a special allocation or minimum annuity (under the *Hickerson* approach) to protect the employee interest in residual assets, the fraction in the event of a termination of the GE plan immediately after the merger would

decline as $15 Billion in GE Plan liabilities is added to the denominator.

$$\frac{\$367{,}002{,}443}{\$16{,}468{,}009{,}771 \quad [\text{combined RCA Plan and GE Plan basic benefits}]}$$

While the residual assets would remain constant, the RCA employees now would be entitled to only 2.23% of the residual assets or $29,960,494—a reduction of some $306,122,802 overnight. The *Brillinger* court simply lost sight of this $300 million overnight loss in concluding that RCA employees have received the same "benefit" in the merger as they would have received if the RCA Plan had terminated immediately before the merger. See, n. 7.

III. THE DISPOSITION OR ALLOCATION OF PLAN ASSETS TO IMPLEMENT A TERMINATION, MERGER OR TRANSFER BETWEEN PLANS IS A FIDUCIARY FUNCTION

"[T]he purpose of ERISA . . . is to immunize an employee benefit plan from the employer's interest; [and] . . . Once [a plan is] in existence, [it's] assets are plan assets . . . subject to ERISA's high fiduciary standards." *Reich v. Valley Nat'l Bank of Arizona*, 837 F. Supp. 1259, 1286 (S.D.N.Y. 1993). It is fundamental to the concept of a trust that assets placed in trust are held subject to the direction and control of the trustee—not the grantor. A separation of power between the "legislative" power of a "settlor" to define the property to be contributed to a trust and its liabilities and the "executive" power of a "trustee" to control assets held in trust is central to the very concept of a trust both at common law and under ERISA.

At common law, the settlor of a trust has the power to specify its benefits and beneficiaries, *Bogert*, § 993, pp. 230-233. Indeed, a settlor must either identify beneficiaries and the benefits to be paid to them or establish

a definite and certain standard for identifying beneficiaries and allocating assets of the trust to them in order to create a trust, *Bogert*, §§ 162, 182, pp. 138, 343-345; *Restatement*, § 120, pp. 252, 254. A transfer which provides complete and unbridled discretion in a trustee to use assets as he wishes creates a gift rather than a trust, *Bogert*, § 162, pp. 143-145.

Once a trust is created, however, it becomes the duty of the trustee to identify the beneficiaries of the trust and to collect, preserve and distribute the property of the trust which is held for them, *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 572, 105 S.Ct. 2833, 2840, 2841 (1985) citing *Bogert* § 582, p. 346; § 583, at 348; *Restatement* §§ 175, 176, 177, pp. 380, 381, 383. The trustee must take possession of the property from the settlor or other person whether the trust is gratuitous or for consideration, *Bogert*, § 583, pp. 348-350, 355; *Restatement* §§ 175, 177, pp. 380, 381 Comment f, 383. Even in a gratuitous trust, the trustee has a duty to oppose any effort to invade or destroy the trust unless it is clearly unreasonable to do so, *Bogert*, § 581, p. 334, § 1001, p. 325; *Restatement*, § 178, p. 385. A power to control the assets of the trust or to direct their use renders the holder of the power subject to fiduciary duty in the exercise of the power even if he is not designated as a trustee, *Restatement*, § 185, p. 397 Comment e. By the very definition of a trust, *Bogert*, § 583, pp. 349, *Restatement*, §§ 2,175, pp. 10, 381, it is thus the trustee who has the legal interest in the property and exclusive possession and control of the assets of the trust.

It remains the duty of the trustee—not the settlor—to allocate and transfer assets in the event of a change of trustees or plan termination, *Bogert*, § 861, p. 22, § 1010, pp. 452-455; *Restatement*, §§ 344, 345, pp. 190, 193. A trustee faced with change of trustee, wind-up or termination of the plan has an obligation to distribute

the property of the trust to the new trustee or, in a termination, the correct beneficiary, *Bogert*, § 1010, pp. 457, 458; *Restatement*, §§ 344, 345, pp. 190, 193. As *Bogert*, § 583, p. 363, observes, a new trustee who is taking over from a prior trustee should assure that he has made a complete and accurate accounting and received delivery of the trust property due him. If there is a default in the transfer, the trustee must sue to correct it, *Bogert*, §§ 583, 592, pp. 367-369, 407; *Restatement*, § 177, p. 383.

John Hancock Mutual Insurance Company v. Harris Trust & Savings Bank, 510 U.S. 86, 95, 114 S. Ct. 517, 523-524 (1993) quoting 29 U.S.C. § 1002(21)(A) (emphasis in the original) recently emphasized that "[a] person is a fiduciary with respect to an employee benefit plan 'to the extent . . . he exercises . . . *any authority or control respecting management or disposition of its assets.* . . . .'" This includes a distribution or allocation of *plan* assets in a plan termination as 29 U.S.C. § 1344(a) provides that *a fiduciary*—the ". . . plan administrator shall allocate the assets of the plan among the participants and beneficiaries . . ." to pay benefits. See also, 29 U.S.C. § 1108(b)(11), (f) (prohibited transaction exemption for transfer of assets or liabilities between multiemployer plans under governmental supervision); 29 U.S.C. § 1108 (b)(9) (exemption for "*fiduciary* . . . distribution of the assets of the plan in accordance with the terms of the plan if . . . distributed . . . as provided under [29 U.S.C. § 1344]"). The same rule applies in plan asset transfers, *Steelworkers, Local 2116*, 860 F.2d at 198 (actual disposition of pension plan assets in sale is subject to fiduciary duty as distinguished from basic decisions about structure), and the allocation of residual assets between employer and employees, *District 65, UAW v. Harper & Row Publishers, Inc.*, 670 F. Supp. 550, 557 (S.D.N.Y. 1987) (citing Department of Labor Letter (March 17, 1986) reprinted at 13 BNA Pension Reporter 472-473).

ERISA thus codifies the common law powers of a trustee —as opposed to a settlor—over trust assets.

The dictionary and common law reach the same result in treating a fundamental alteration of the beneficiaries or purpose of a trust as a fiduciary "disposition" of trust assets which is subject to judicial regulation. In *Montgomery v. Carlton*, 99 Fla. 152, 169, 126 So. 135, 142 (1930), the court held that "[d]isposed of 'means' to part with; to relinquish; to get rid of." It found that language in the trust "that the premises shall be used, kept, maintained and *disposed of* as a place of divine worship," constrained the trustees to apply the proceeds of a sale of trust property for the uses and purposes of the trust, *id.* (emphasis supplied). The common law similarly treated the transfer or division of trust assets between employers as the equivalent of a sale of trust assets and termination of the trust. See *In Judicial Settlement of the Account of the Marine Midland Trust Company of New York*, 144 N.Y.S.2d 4, 6 (N.Y. Sup. Ct. 1955) (petition for termination of fund and division of assets among successor employers approved based on valuation of assets at fair market value). In *Coe*, 149 Mass. at 550, 21 N.E. at 967, the court described an action to allocate trust assets between employer and employee interests as a claim ". . . to *dispose* of the whole of this Fund."

The courts have followed the lead of the common law and Department of Labor to distinguish a lawful employer act to amend, terminate or merge an employee benefit plan from unlawful acts to misallocate or transfer plan assets in the implementation of the reorganization. See, e.g., *Reich v. Lancaster*, 55 F.3d 1034, 1057 (5th Cir. 1995) (notice of lawful merger is not notice of unlawful acts in its implementation to trigger statute of limitations). As in any situation involving large sums of money, abuse has reared its ugly head and required a remedy under the fiduciary rules of ERISA. See, *John Blair*, 26 F.3d at 363-364, 367 (fiduciary breach in

unlawful delay between calculation of participant balances and actual asset transfer to keep an extra $500,000 in investment gains in a lawful spinoff); *Pilkington PLC v. Perelman*, 72 F.3d 1396, 1397-1398, 1401 (9th Cir. 1995) (self-dealing and kickbacks in a lawful termination to give employer $13 Million; employees left with insolvent insurer); *Waller v. Blue Cross of California*, 32 F.3d 1337, 1341 (9th Cir. 1994) (claimed imprudent purchase of annuity contract from insolvent insurer in lawful termination); *District 65, UAW v. Harper & Row Publishers, Inc.*, 576 F. Supp. 1468, 1480 (S.D.N.Y. 1983) (actuarial games with interest rates to minimize employee distributions and maximize employer reversion in lawful termination). There is no remedy in the statute for such misconduct outside the fiduciary responsibility provisions of ERISA.

The decision in *Systems Council EM-3 v. AT&T Corp.*, 972 F. Supp. 21 (D.D.C. 1997) starkly illustrates the need to separate an employer's legislative or settlor acts from their implementation in an allocation or disposition of plan assets. AT&T previously negotiated separate trusts under 26 U.S.C. § 501(c)(9) to fund anticipated retiree medical liabilities. These trusts were funded, in part, by a negotiated transfer of surplus pension plan assets under 26 U.S.C. § 420. The AT&T retiree medical trusts had benefit liabilities of $9.125 Billion and assets of only $2.895 Billion, and were thus insolvent on a "balance sheet" basis when AT&T divested Lucent Technologies in a spin-off.

The common law requires a pro rata distribution of the assets of an insolvent trust among its creditors or beneficiaries, *Cunningham v. Brown*, 265 U.S. 1, 13, 44 S. Ct. 424, 427 (1924); *Goldberg v. N.J. Lawyer's Fund for Client Protection*, 932 F.2d 273, 280-281 (3d Cir. 1991). The benefits claims of employees are liabilities of the AT&T Welfare Trusts with priority over any employer claim, 29 U.S.C. § 1132(d) (employees have benefit claims against plan assets). See *Wilson v. Blue-*

field Supply Co., 819 F.2d at 459 ("residual" assets mean only assets remaining *after* payment of benefits); *In Re*: *William H. Luden, Inc. Employees Trust Fund*, 72 D&C 566, 570 (Pa. Comm. Pleas 1949) (applying rule to divide pension plan assets among employes even in the absence of "vested" claims). The District Court, *Systems Council EM-3*, 972 F. Supp. at 31, 32, nonetheless held that *Lockheed v. Spink* allows an employer to transfer employees and more than $6.341 Billion in liabilities to Lucent while retaining every dime of $3 Billion in trust assets to overfund its retained liabilities of $2.784 Billion with no possibility of judicial review. This legitimatizes conduct which would be a fraudulent conveyance at common law.

The Court has never given such an expensive reading to employer powers with respect to plan assets under ERISA. *Comm'r v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 113 S. Ct. 2006, 2009 (1993) held that passive acceptance of real estate—rather than cash—by a pension plan trustee in satisfaction of the employer's minimum funding contributions violates the tax paralled to 29 U.S.C. § 1106(a)(1)(A) because the employer can overvalue the property to its benefit and reduce a large cash debt. A trustee also cannot passively accept an employers' efforts to invade the actual corpus of the trust to transfer assets attributable to employee contributions for "use by or for the benefit of," 29 U.S.C. § 1106(a)(1)(D), a different plan or group of employees and to offset Hughes' obligation to fund pension benefits for a different plan or group.[8]

The same concepts are part of ERISA's specific prohibition against inurement of plan assets to the employer

[8] The use of surplus assets attributable to employer contributions may not raise the same issues. The employer is the beneficial owner of these assets in a termination, merger or transfer under 29 U.S.C. §§ 1058, 1344(d)(3).

sponsor, 29 U.S.C. § 1103(c), as well as its general rules of fiduciary duty. *Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 592, 113 S.Ct. 2252, 2259 (1993), recognized a possible ERISA claim on remand over retention of welfare plan assets attributable to withdrawing or transferred employees. See further, *Trapani v. Consolidated Edison Employees Mutual Aid Society, Inc.*, 891 F.2d 48, 50 (2d Cir. 1989) (unjust enrichment in retaining assets allocable to transferred employees); *John Blair*, 26 F.3d 370 (employer and its plan would be unjustly enriched by holding investment earnings allocable to transferred participants). An employer similarly cannot apply plan assets to its own debts without violation of 29 U.S.C. § 1103(c), *FDIC v. Marine Nat'l Exchange Bank of Milwaukee*, 500 F. Supp. 108, 113 (E.D. Wisc. 1980). Whether assets are retained while participants leave or are transferred to offset employer liabilities in a new plan, there is inurement in the use of "other people's money."

CONCLUSION

ERISA is not a new statute in perpetuation of frauds. The Court should determine that employees have a right to protection of assets attributable to their employee contributions against loss or dilution in a termination, merger or transfer of defined benefit pension plans and remand for further proceedings in accordance with this rule.

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(16)

No. 97-1287

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

HUGHES AIRCRAFT COMPANY, ET AL.,

Petitioners,

v.

STANLEY I. JACOBSON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
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BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

<u>**INTERESTS OF AMICI CURIAE**</u>

Amici are associations whose members maintain pension and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*[1]

[1] Letters from petitioners and respondents indicating consent to file this brief are on file with the Clerk. Pursuant to Rule 37.6, *amici* state that no counsel for any petitioner or respondent authored this brief in whole or in part. No person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief.

The ERISA Industry Committee ("ERIC") is a nonprofit organization representing America's largest employers that maintain ERISA-covered pension and other employee benefit plans providing benefits to millions of active and retired workers nationwide.

The NAM is the nation's oldest and largest broad-based industrial trade association; its nearly 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM through its Associations Council and National Industrial Council. Virtually all of the NAM's members maintain one or more employee benefit plans governed by ERISA.

Both ERIC and the NAM frequently participate as *amici* in cases with the potential for far-reaching effects on employee benefit plan design or administration. ERIC previously filed a brief *amicus curiae* in support of the petition for writ of certiorari in this case.

Amici have a strong interest in the issue presented by this case, which could be extremely detrimental to both employers and employees who participate in ERISA-covered plans that have or have had an employee contribution feature. If the opinion of the Court of Appeals is upheld, employers that sponsor such plans will face major deterrents to amending their plans to offer new or enhanced benefits to active employees, and many employees now and in the future will be denied the opportunity to enjoy such benefit improvements. Moreover, employers that have already made such amendments could face similar litigation seeking "in effect" to terminate the plan in a manner that will generate unintended windfalls for some retirees while compromising the employer's ability to provide pension benefits to current and future employees.

Because of the importance of these issues to *amici* and their members, they submit this brief to assist the Court in its resolution of the case.

STATEMENT

This case involves a challenge to two amendments to Petitioner Hughes Aircraft Company's ("Hughes") Non-Bargaining Retirement Plan (the "Hughes Plan"), an ERISA-covered plan. Respondents are five retired employees who are participants in the Plan. They purport to represent "a class consisting of all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan." Pet. App. 133a.

The Hughes Plan is a single-employer "defined benefit" plan. A defined benefit plan is one in which the employee, upon retirement, is entitled to a fixed periodic payment calculated in accordance with the terms of the plan, regardless of the performance of the plan's assets. *Nachman Corp. v. Pension Benefit Guaranty Corp.*; 446 U.S. 359 (1980); *see also Commissioner v. Keystone Consolidated Industries*, 508 U.S. 152, 154 (1993). If unsuccessful investment impairs the plan's ability to pay the defined benefits from plan assets, the employer must make up any deficiency from its own assets. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 230 (1986) (O'Connor, J., concurring). In a defined benefit plan, accordingly, the risk of investment gain or loss lies with the employer-sponsor rather than with the employee-participant.[2]

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[2] A defined benefit plan such as the Hughes Plan stands in contrast to a defined contribution plan. In a defined contribution plan, a participant's benefits are based upon the sum of the contributions to the plan made by him or by the employer on his account, plus any forfeitures allocated to his account, together with the gains or losses attributable to those contributions and forfeitures. 29 U.S.C. § 1002(34). In a defined contribution plan the risk of investment gain or loss lies entirely with the employee. *Nachman*, 446 U.S. at 364 n.5.

Some defined benefit plans, including the Hughes Plan, require or formerly required employees to contribute to the funding of the plan. *See Malia v. General Electric Co.*, 23 F.3d 828, 830 n.2 (3d Cir. 1994). The difference between a contributory and noncontributory defined benefit plan is in many respects more a difference of form rather than substance.[3] In both cases, the employer-sponsor is ultimately responsible for paying retirees the defined benefit.

Respondents' complaint alleges that by the end of 1985, the Hughes Plan "had accumulated a substantial overfunding" amounting to roughly $1 billion and that from 1986 to 1990 Hughes was not required to make any contributions to the Plan, although employees continued to contribute. Pet. App. 137a.

Respondents contend that Hughes diverted the Plan "surplus" for its own benefit, and violated its fiduciary duties to retirees by adopting two amendments to the Hughes Plan. Pet. App. 139a-140a. One amendment, adopted in 1989, added special early retirement incentives that, by definition, were not available to retirees. Pet. App. 137a-138a. The other amendment, effective January 1, 1991, gave existing Plan participants who were still active employees the option of continuing to make contributions to the Plan or ceasing them (which would give them a correspondingly lower pension benefit upon retirement), and eliminated the contributory feature altogether for new employees. *Id.*

Plan amendments such as those challenged by respondents are not at all uncommon. ERIC and NAM separately surveyed their members, and a total of 57 large employers, sponsoring a total of

[3] When an employer eliminates an employee contributory feature, the employer's total compensation costs (cash wages plus employer payments for benefits) increase in the absence of either a reduction in wages or in the cost of benefits. Because employers are generally sensitive to total compensation costs, that increase in costs is likely to inhibit increases in other components of total compensation.

244 defined benefit plans, responded.[4] The surveys indicate that 86 of those 244 plans (35%) had been amended at one time or another to add or enhance an early retirement feature, and 151 plans (62%) had been amended to add a new or different benefit or benefit formula limited to participants who had not yet retired. Furthermore, while defined benefit plans that have or have had a contributory feature represent only a minority of all defined benefit plans, it is a significant minority. ERIC's and the NAM's surveys showed that 96 of 244 plans responding currently have or have had contributory features, or were merged with or spun-off from plans that had such features.

In addition to alleging that the 1989 and 1991 amendments constituted an unlawful use of Plan assets, respondents also contend that the Hughes Plan was "constructively" terminated when its contributory feature was amended, and that "excess" plan assets should therefore be distributed to them. Pet. App. 140a-142a.

The District Court dismissed the complaint for failure to state a claim for which relief can be granted. Pet. App. 63a. The Ninth Circuit reversed in a divided opinion. Pet. App. 1a. This Court granted the petition for certiorari on April 27, 1998.

SUMMARY OF ARGUMENT

Were it not for the contributory feature of the Hughes plan, the breach of fiduciary duty claims in this case would clearly be disposed of on the basis of *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996). There, as here, the gist of the complaint was that the addition of an early retirement program (which benefits the employer by helping to reduce its workforce) was a conversion or use of plan assets for the benefit of the employer. There, as here,

[4] Many companies sponsor different defined benefit plans for participants who work or who prior to retirement worked in different job classifications (such as hourly wage earners and salaried employees) or in different units or divisions of the company.

the answer is that adding benefits and beneficiaries are the functions of plan settlors, not fiduciaries, so that fiduciary obligations—including the duty to administer the plan solely for the benefit and in the interest of participants—simply do not come into play.

In this case, the Ninth Circuit panel majority attempted to distinguish *Lockheed* solely on the basis of the contributory feature of the Hughes Plan. That distinction does not withstand analysis, and accordingly the decision below should be reversed.

On the fiduciary duties issue, it was error for the panel majority to treat the so-called plan "surplus" attributable to employee contributions as a distinct asset for which Hughes as Plan sponsor has special fiduciary responsibility and in which Plan participants enjoy something akin to an ownership interest. Whether a plan is contributory or noncontributory, a participating employee's only claim in a defined benefit plan is to the fixed benefit that has been promised by the terms of the plan. The only significance of the plan being contributory relates to the vesting, or nonforfeitability, of those fixed benefits, and to the disposition of the plan's assets upon "termination" within the meaning of the statute. An employee who made contributions to a defined benefit plan has no ownership interest in the "surplus" of an ongoing plan, and the contributory feature does not transform the settlor's decisions into the acts of an ERISA fiduciary when those decisions otherwise would fall outside the statute's definition of fiduciary activities.

The Ninth Circuit panel majority also erred in holding that the question whether a plan has been terminated presents an issue of fact to be resolved after discovery. The exclusive means of terminating a defined benefit plan is found in ERISA Section 4041, 29 U.S.C. § 1341. Where no plan termination within the meaning of Section 4041 has occurred, employees cannot assert any right to residual assets under Section 4044, 29 U.S.C. § 1344. The Hughes Plan is an ongoing plan that has not terminated under Section 4041,

and that is sufficient to require dismissal of the respondent retirees' claims under Section 4044.

<u>ARGUMENT</u>

I. PARTICIPANTS IN A CONTRIBUTORY DEFINED BENEFIT PLAN DO NOT HAVE A BENEFICIAL OWNERSHIP INTEREST IN THE PLAN'S SO-CALLED "SURPLUS."

The Ninth Circuit panel majority erroneously held that in a contributory defined benefit plan under ERISA, "employees are vested in their own contributions and the income generated therefrom." Pet. App. 21a. This is a wholly inaccurate description of a defined benefit plan, such as the Hughes Plan. In contrast to a defined *contribution* plan, in which the employee's pension benefit is determined by the contributions to the plan by him and on his behalf, as well as the earnings attributable to those contributions, the terms of a defined *benefit* plan spell out the benefits to be paid without reference to contributions or earnings on contributions. *See supra* p. 3; *see also Keystone Consol. Indus.*, 508 U.S. at 154; *Nachman*, 446 U.S. at 364 n.5.

The critical difference between defined contribution and defined benefit plans is who bears the risks and rewards of the investment of the funds. In a defined contribution plan, all risks and rewards fall on the employee-participant. In a defined benefit plan, the risks and rewards all fall on the employer: if the plan's investments fare poorly, the employer must still contribute whatever is required to deliver the promised benefit to the employee at retirement; conversely, favorable investment performance might lighten and even eliminate for varying periods of time the need for employer contributions.

That a defined benefit plan is also contributory does not turn the plan into a defined contribution program. As Judge Easterbrook has explained, workers who contribute to a defined benefit plan

purchase "a promise of benefits," not a share in "a pool of assets." *Johnson v. Georgia-Pac. Corp.*, 19 F.3d 1184, 1186 (7th Cir. 1994). The interest of an employee who contributes to a defined benefit plan is thus akin to the interest of a purchaser of a conventional annuity contract who buys a specified stream of payments. *Id.* It is not like owning shares in a mutual fund where the value of the interest depends on the fund's investment successes or failures.

Here, the Ninth Circuit panel majority confused these two concepts. It held that a contributory defined benefit plan is a sort of hybrid plan—in which an employee's contribution to the employer's pension plan entitles that employee upon retirement not only to a fixed, defined benefit, but also potentially to any investment return attributable to his or her contributions. In this hybrid, the employer bears all the risk and obligation of a defined benefit plan and the employee enjoys all the rewards, but none of the risk, of a defined contribution plan. Under the majority's view, the *defined* benefit becomes a *minimum* benefit.

Judge Norris in his dissent explained why this result flies in the face of economic reality:

> Pension law covers bad times as well as good times. In bad times (when declines in the value of assets make plans underfunded) employers must contribute more. If in good times employers were required to distribute the surplus to retirees on the theory that they "owned" that value, outcomes would be asymmetric. Employers would be liable for shortfalls but could reap no benefit from surpluses.

Pet App. at 29a, quoting from *Johnson*, 19 F.3d at 1190.

As demonstrated by the facts of this case, the implications of recognizing this new type of hybrid plan are severe. Whenever a defined benefit plan contains so-called "surplus," the employer

cannot amend the plan to add a new benefit or a new benefit structure applicable to a subset of plan participants (for example, current workers but not retirees). This is because the Ninth Circuit treats the so-called "surplus" attributable to employee contributions as a distinct asset in which plan participants enjoy something akin to an ownership interest that bestows upon plan sponsors a special fiduciary responsibility.

Repeatedly, this Court has held that ERISA's fiduciary provisions do not prevent an employer or other plan sponsor from adopting an amendment to its welfare or pension plans "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (welfare plans); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996) (pension plans). These cases firmly establish that an employer's amendment to its plan is the act of a "settlor" and not a "fiduciary" as defined by ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A). *Curtiss-Wright*, 514 U.S. at 78; *Lockheed*, 517 U.S. at 890-91. Therefore, the obligation that fiduciaries discharge their duties "solely in the interests of participants and beneficiaries" and "for the exclusive purpose of providing benefits to participants and their beneficiaries" do not apply to an employer's amendment of its benefit plans. ERISA Section 404, 29 U.S.C. § 1104; *see Curtiss-Wright*, 514 U.S. at 78; *Lockheed*, 517 U.S. at 890-91.[5]

The Ninth Circuit's newly-created exception to that rule for plans with contributory features disregards what this Court in *Lockheed* called the statute's "simply stated" language, "general"

[5] Although the act of amending a pension plan to add benefits or beneficiaries falls outside ERISA's fiduciary provisions, other provisions of the statute operate to protect employees' interests. *See, e.g.*, ERISA Section 204(g), 29 U.S.C. § 1054(g) (plan amendments generally may not decrease accrued benefits); ERISA Section 307, 29 U.S.C. § 1085b (if adoption of an amendment results in underfunding of a defined benefit plan, the sponsor must post security for the amount of the deficiency). *See generally Lockheed*, 517 U.S. at 891.

terms, and "uniform" standards regarding fiduciaries—all of which, the Court held, required it to apply the same rules regarding fiduciary capacity to pension plans as are applied to welfare plans.

The Ninth Circuit's result rests not on the statute's definition of a "fiduciary" act,[6] but on two unrelated statutory provisions. App. 9a. Neither of these provisions is sufficient to alter the general rule that an employer that amends its plan to offer new benefits or a different benefit structure is acting as a settlor and not a fiduciary.

The first provision relied upon by the Ninth Circuit is the minimum vesting provisions of ERISA Sections 203 and 204, 29 U.S.C. §§ 1053, 1054 (1994). Under ERISA, an employee must acquire nonforfeitable rights in the accrued benefits derived from his or her employer's contributions to the plan according to the statute's prescribed vesting and accrual schedules. ERISA Section 203(a)(2) (vesting schedules), 29 U.S.C. § 1053(a)(2); Section 204(b)(1) (accrual schedules), 29 U.S.C. § 1054(b)(1). An employee's rights in the accrued benefits derived from his or her own contributions to the plan must always be nonforfeitable. ERISA Section 203(a)(1), 29 U.S.C. § 1053(a)(1).

In a defined contribution plan, the nonforfeitable "accrued benefit" attributable to an employee's contributions is equal to his or her contributions, any allocable forfeitures, and the income, expenses, gains, and losses attributable to the contributions and forfeitures. ERISA § 204(c)(2)(A)(i), 29 U.S.C. § 1054(c)(2)(A)(i). In a defined benefit plan, on the other hand, the "accrued benefit" attributable to an employee's mandatory

[6] The statute states that a person is a fiduciary with respect to a plan "to the extent" he or she "exercises any discretionary authority or . . . control respecting management of such plan or . . . its assets," "renders investment advice," or can exercise "discretionary authority or . . . responsibility in the administration of such plan." ERISA Section 3(21)(A), 29 U.S.C. § 1002(21)(A).

contributions is equal to the sum of the employee's contributions, plus interest at a rate prescribed by statute. ERISA § 204(c)(2)(C), (D), 29 U.S.C. § 1054(c)(2)(C), (D). That prescribed rate since 1987 is an interest rate equal to 120 percent of the federal mid-term rate in effect for the first month of a plan year. *Id.*

The panel majority held that if a plan is contributory, "employees are vested in their own contributions and the income generated therefrom." Pet. App. 21a. This is simply not true in the case of a defined benefit plan such as the Hughes Plan. As the statute makes clear, in a defined benefit plan, employees are vested only in an accrued benefit that is attributable to the contributions themselves plus specified levels of imputed annual interest. The amount of interest imputed to the employee contributions is fixed by law, and is wholly unrelated to the successes or the failures of the plan's investments.[7] Far from creating the broad ownership right the panel majority purports to find, that vested interest becomes a plan liability that reduces the plan's so-called surplus.

The second provision relied on by the panel, ERISA Section 4044(d)(3)(A), 29 U.S.C. § 1344(d)(3)(A), addresses asset allocation upon plan termination. Plan termination by an employer is governed exclusively by ERISA Section 4041, 29 U.S.C. § 1341. In order to terminate a plan, the plan administrator must file a notice with the Pension Benefit Guaranty Corporation (PBGC) and must wait, before taking further action, until the time for the PBGC to issue of notice of noncompliance has expired. 29 U.S.C. § 1341(a), (b). Assets must then be allocated to various types of benefit liabilities in order of priority pursuant to ERISA Section 4044(a), 29 U.S.C. § 1344(a).

[7] Respondent retirees do not allege in their complaint that the two amendments to the Hughes Plan resulted in a prohibited forfeiture of the defined benefit that they had been promised or that the amount of the benefit was less than the amount that had vested as a result of their contributions. Rather, they assert a right to all of the investment earnings attributable to their contributions. Pet. App. 139a-140a.

Where the assets are sufficient, the level of benefits to be paid following termination will be equal to what is specified in the plan. *See generally Mead Corp. v. Tilley*, 490 U.S. 714, 717 (1989). If there are "residual assets" left in the plan after all liabilities have been satisfied, ERISA Section 4044(d)(3)(A), 29 U.S.C. § 1344(d)(3)(A), provides that the residual assets attributable to employee contributions shall be distributed to the contributing employees. Residual assets not attributable to employee contributions may revert to the employer, if the plan so provides. ERISA Section 4044(d)(1), (2), 29 U.S.C. § 1344(d)(1), (2).

The Ninth Circuit bootstrapped the contingent remainder interest prescribed by Section 4044(d)(3)(A) into a general ownership or beneficial interest in plan "surplus" no matter whether any termination of the plan has occurred or is contemplated. *See* Pet. App. 9a. But a plan's so-called "surplus" is simply a means of describing the difference at any given moment between the value of the assets held by the plan and an actuarial estimate of the costs of paying future benefits. *See* Pet. App. 32a (Norris, J., dissenting) ("'surplus' in a pension fund is nothing more than an actuarial artifact"); *see also Johnson*, 19 F.3d at 1189 ("surplus . . . is an accounting construct"). Plan "surplus" can shrink or even be turned into a "deficit" for any number of reasons, including an unexpected increase in early retirements, retirees living longer than the actuaries predicted, plan earnings falling below actuarial assumptions, stock market corrections, and the hiring of many new employees who become participants in the plan.

A plan's "surplus" is never immutable except upon termination, after all liabilities have been identified, prioritized, and settled through the purchase of annuities. ERISA Section 4041(b)(3), 29 U.S.C. § 1341(b)(3). Then, and only then, can there be an accurate calculation of "surplus" capable of distribution to employees or reversion to the employer. This is why an employer-sponsor of a noncontributory plan whose plan is overfunded cannot, absent termination, reappropriate assets to itself simply because the fund has an actuarial "surplus." Similarly, employees who

participate in a contributory plan have no claim to the "surplus" theoretically attributable to their contributions unless and until the plan has terminated and all liabilities have been satisfied. *See Walsh v. Great Atlantic and Pacific Tea Co., Inc.*, 96 F.R.D. 632, 652 (D.N.J. 1983) ("As long as the remainder of the plan remains ongoing, 'excess assets' is a meaningless concept, since the amount of any surplus can only be calculated after a complete termination of the plan."), *aff'd*, 726 F. 2d 956 (3d Cir. 1983).

The existence of a "surplus" has no bearing on the benefits due to the participants in an ongoing pension plan. It no more entitles contributing employees to additional benefits than a plan "deficit" would support a reduction in their pensions.

By mistakenly treating plan "surplus" not as an actuarial construct but as a pool of assets akin to a mutual fund, the Ninth Circuit took two narrow ERISA provisions applicable only to quite specific circumstances and from them derived a broad abstract principle that "when both the employer and its employees contribute to a pension plan, the employer does not have sole discretion to use that part of a plan's asset surplus attributable to employee contributions." Pet. App. 21a. This is a leap in logic that simply is not supported by the statutory scheme. Even less supportable is the court's second leap—that an employer that amends a contributory plan to add new or different benefits at a time when a plan "surplus" exists is necessarily acting in a fiduciary capacity. Pet. App. 16a. This second leap is made without any reference to the statutory definition of a fiduciary.[8]

[8] The panel majority noted that "because Hughes was disposing of the plan's assets when it amended the plan, Hughes's amendment necessarily affected the management and administration of the plan." Pet. App. 16a. This nod to the statutory definition of "fiduciary" is wholly unpersuasive. It would encompass virtually *all* plan amendments. This Court has made clear that an employer acting to amend its plan is not "managing" or "administering" assets within ERISA's definition of fiduciary. *Lockheed*, 517 U.S. at 890; *Varity Corp. v. Howe*, 516 U.S. 489, 505 (1996).

Finally, in addition to having no grounding in the statute, the decision below is completely unworkable. An employer that wanted to amend a plan to offer new or different benefits to some but not all plan participants—such as active but not retired employees, older but not younger employees, employees in one location but not another—could not do so if the plan at that point in time had a "surplus," for the "surplus" would always include some assets theoretically attributable to contributions made by the excluded employees. The employer would either have to offer the new benefits to all—which might defeat the purpose of offering them in the first place—or wait until plan "surplus" was eroded, a process that might take many years (or that might never occur) if the plan enjoyed a high return on its investments.

Not surprisingly, neither the respondents nor the court below can point to anything in ERISA suggesting that Congress wished to put a freeze on amendments to contributory defined benefit plans (or plans that had once been contributory) whenever the plan enjoyed investment success beyond its actuarial estimates. Indeed, such a result would severely restrict benefit plan "design"—a subject that Congress unquestionably left to employer discretion. *See, e.g.*, *Lockheed*, 517 U.S. 890-91; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981).

II. THE TERMINATION OF A PLAN IS A QUESTION OF LAW GOVERNED SOLELY BY ERISA, NOT A QUESTION OF FACT.

The panel majority also erred in holding that the trial court could find as a matter of fact that Hughes' 1991 Plan amendment caused a "termination" of the Plan, triggering Section 4044's required allocation of plan assets. *See* Pet. App. 10a-12a, 22a-23a. Plan termination is a wholly legal question, governed by a highly detailed and specific statutory scheme.

Plan termination is a topic that Congress has addressed in painstaking detail in Title IV of ERISA. *See* ERISA Sections 4041-

48, 29 U.S.C. §§ 1341-48. Section 4041(a)(1), the key termination provision in this highly detailed regulatory scheme, is entitled "*Exclusive* means of plan termination" (emphasis added) and provides:

> Except in the case of a termination for which proceedings are otherwise instituted by the [Pension Benefit Guaranty C]orporation as provided in section 4042 of this title, a single-employer plan may be terminated only in a standard termination under subsection (b) of this section or a distress termination under subsection (c) of this section.

ERISA Section 4041(a)(1), 29 U.S.C. § 1341(a)(1).

Section 4041 goes on to provide that, in order to terminate a plan, the plan administrator must file a notice with the PBGC and must wait, before taking further action, until the time for the PBGC to issue of notice of noncompliance has expired. ERISA Section 4041(b)(2)(C), 29 U.S.C. § 1341(b)(2)(C). Assets must then be allocated to various types of benefit liabilities in order of priority pursuant to ERISA Section 4044, 29 U.S.C. § 1344(a). To the extent that assets are sufficient to cover liabilities under a plan, the administrator of a terminating plan is directed to "fully provide all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(ii). This usually involves purchasing annuities from an insurer. 29 U.S.C. § 1341(b)(3)(A)(i). Only after all liabilities have been satisfied does the statute address the issue of distribution of residual assets, if any. *See* Section 4044(d), 29 U.S.C. § 1344(d).

Ignoring all but that part of the statute relating to distribution of residual assets, the panel majority held that Hughes may have "in effect, terminated" the plan or that its conduct may have amounted to a "constructive" termination of the plan, Pet. App. at 10a, 11a n.3. As the panel majority saw it, whether amending a retirement plan to add a new benefit formula amounts to "constructive" termination is a factual issue to be resolved only after discovery. *See id.* at 11a n.3, 22a-23a.

The majority opinion is notably lacking in citation to statutory or case law authority for its holding, but there are indications that it may have been misled by certain tax and trust law concepts inapplicable to ERISA Title IV. First, under the Internal Revenue Code, in order to "qualify" for preferential tax treatment, a plan must provide that accrued benefits become nonforfeitable, to the extent then funded, upon complete or partial termination of the plan (even if those benefits would not otherwise have vested). *See* 26 U.S.C. § 411(d)(3). The purpose of this provision is to protect employees by ensuring that they cannot be deprived of anticipated benefits through an employer's elimination of the opportunity to have those accrued benefits vest. *See United Steelworkers v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir. 1983); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402 (2d Cir. 1985), *cert. denied*, 474 U.S. 1113 (1986).

The Treasury regulation implementing Code Section 411(d)(3) defines a plan "termination" that can lead to vesting of accrued benefits as either one in which the plan has been involuntarily terminated by the PBGC or one in which the employer has voluntarily terminated the plan under the procedures set forth in ERISA Section 4041. *See* 26 C.F.R. § 1.411(d)-2(c). In contrast, a "partial termination" for purposes of vesting under Section 411(d)(3) is determined by "all the facts and circumstances" in a particular case, and might include a large reduction in the work force or a sizable reduction in benefits under the plan, such that a significant percentage of employees have lost the opportunity to have accrued benefits vest. *See* 26 C.F.R. § 1.411(d)-2(b)(1).[9]

The tax-law notion of "termination" is completely irrelevant here because respondents have made no claim that certain accrued benefits under the plan should have become nonforfeitable at the time of the 1991 amendment. In any event, even the Treasury

[9] The regulation cited by the Ninth Circuit, 26 C.F.R. § 1.401-6(b)(i), predates ERISA. *See* 11a n.3., 49a, 52a.

regulation recognizes that a voluntary termination can take place *only* under the procedures set forth in ERISA Section 4041. *See* 26 C.F.R. § 1.411(d)-2(c).[10]

The court's suggestion that the District Court could find that the Hughes Plan may have terminated as a "wasting trust"—*i.e.*, one that pays only previously accrued benefits—likewise misperceives the exclusive role of Section 4041 in plan terminations. Pet. App. 11a n.3. Although wasting trusts were at one point an allowable means of terminating a trust under Section 4041, they were eventually prohibited by PBGC regulations, *see* 29 C.F.R. § 2617.4(a) (1984), and that prohibition is now embedded in statute. *See* ERISA § 4041(b)(3)(A), as amended by Single-Employer Pension Plan Amendments Act of 1986. Plan terminations may now occur only through the purchase of annuities in satisfaction of benefit liabilities. *Id., see generally* Edward T. Veal and Edward R. Mackiewicz, Pension Plan Terminations § 6.1 (1989 & Supp.). Unquestionably that is not what happened here.

By importing irrelevant tax and common law trust concepts into ERISA Title IV, the Ninth Circuit casts doubt on a plan amendment that appears to be no different from the type of plan amendment that thousands of employers routinely have adopted to alter, and typically to improve, plan benefits for participants.

[10] The concept of a "partial termination" is peculiar to the tax code and concerns only whether certain accrued benefits must become nonforfeitable. It does not constitute a termination for purposes of allocation of assets under Title IV of ERISA. *See, e.g.*, ERISA Section 4043(c)(4), 29 U.S.C. § 1343(c)(4)(1994); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1516 (10th Cir. 1996); *Borst v. Chevron*, 36 F.3d 1308, 1315 (5th Cir. 1994); *Chait v. Bernstein*, 835 F.2d 1017, 1020-21 (3d Cir. 1987); *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1299 (3d Cir. 1983); *Baum v. Nolan*, 853 F.2d 1071, 1076-77 (2d Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989).

There appears to be no dispute that many active Hughes employees elected to continue making contributions in order to qualify for the older and more generous benefit formula. There are only conclusory allegations that "in effect" two plans were created and that the amendment was "equivalent" to a termination. Such allegations are simply artful pleading tactics designed to portray a legal claim as a factual issue.

Employers commonly improve pension benefits for their employees by adding an additional benefit formula to the plan. In many cases, benefits are calculated separately for each employee under the several formulas in the plan, with the employee receiving benefits under the formula that produces the largest benefit. But it is also a common practice, as was done here, to extend to new or future employees only a newly adopted benefit formula. If employers must run the risk on a case-by-case basis of having a court find as a factual matter that the adoption of a new benefit formula somehow terminates a plan, possibly with very serious adverse tax consequences for both the employer and its employees, a very substantial and quite unnecessary obstacle will be placed in the path of improved employee benefits.

The court of appeals' suggestion that when a plan amendment limits a pre-existing benefit formula to current participants but adopts a new formula for future participants, the amendment may amount to a "constructive termination" of the plan, *see* Pet. App. 11a n.3, has very troubling implications that extend well beyond the immediate context of contributory defined benefit plans. The notion that "freezing" or limiting an existing benefit formula to current participants is a "constructive" termination could mean, for example, that the Pension Benefit Guaranty Corporation would be required to assume many billions of dollars in additional termination liabilities for underfunded plans. *Cf. United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983).

For all these reasons, it was error for the Ninth Circuit to hold that the Hughes Plan could "in effect" have terminated without

complying with the procedures prescribed by Section 4041. That section "provide[s] the sole and exclusive means under which a qualified pension plan may be terminated." H.R. Rep. No. 300, 99th Cong., 2d Sess. 289 (1985). *See In re Esco Manufacturing Co.*, 50 F.3d 315, 316 (5th Cir. 1995); *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995); *Phillips v. Bebber*, 914 F.2d 31, 34 (4th Cir. 1990). There having been no allegation that the Hughes Plan terminated under Section 4041, it was error for the Ninth Circuit to remand for further proceedings on the question of whether a termination had occurred. The district court rightly dismissed that claim as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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(17)

No. 97-1287

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND
HUGHES NON-BARGAINING RETIREMENT PLAN,
Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH,
ROBERT E . MCMILLIN, ERNEST O. BLANDIN,
AND RICHARD E. HOOK,
Respondents.

**On Writ of Certiorari To The
United States Court of Appeals For the Ninth Circuit**

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF NEITHER PARTY

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BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*[1/]

The American Association of Retired Persons (AARP), a nonprofit membership organization of more than 30 million

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[1/] No counsel for any party authored any portion of this brief. No persons other than AARP, its members, or its counsel have made a monetary contribution to the preparation and submission of this brief. Some of the Respondents may be AARP members and pay AARP membership dues.

Americans age 50 or older, is dedicated to addressing the needs and interests of older persons. One of AARP's primary objectives is to promote the economic security of individuals as they age. AARP seeks to increase the availability, security, equity, and adequacy of public and private pension plans through educational and advocacy efforts.

Many of AARP's members, working and retired, are participants and beneficiaries in employer-sponsored pension plans covered by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq*. These AARP members, as well as other older Americans, depend on these pension plans and the retirement benefits paid from them for their economic security in retirement.

As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving ERISA, including *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

It is vitally important to AARP members to ensure that employers do not illegally siphon a plan's surplus for corporate needs.[2] AARP members and other older

[2] Due to the stock market's surge during the last fifteen years, pension assets have grown exponentially, resulting in large surpluses. Tim Smart, *Swollen Pension Funds, Surprise Profits*, WASHINGTON POST, June 14, 1998, at H1. These surpluses may tempt employers to illicitly utilize plan assets. However, as more fully explained below, an employer's use of surplus plan assets may be restricted by ERISA's fiduciary rules.

Americans have a significant interest in ensuring that the plan's assets will be available to pay the retirement benefits to which they are entitled and that plan assets are used exclusively for the benefit of participants and beneficiaries. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). In particular, the statutory scheme established by Congress for distribution of benefits upon a plan termination must not be compromised.

Accordingly, this case will have a direct bearing on the economic security of millions of Americans, including members of AARP. In light of the significance of these issues to AARP and its members, AARP respectfully submits this brief *amicus curiae*.[3]

SUMMARY OF ARGUMENT

This case presents an opportunity to establish guidelines for analyzing the circumstances under which an employer can be liable for a breach of fiduciary duty as a result of a plan amendment. AARP submits that the guidelines it has identified below will provide considerable assistance to lower courts in their efforts to define the phrase "generally free" to amend.

Employers are "generally free" to amend their employee benefit plans. *Lockheed Corp. v. Spink*, 517 U.S. 882, 889-91 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). But no substantive provision of ERISA may be violated, no express term of the plan's governing documents may be violated, and ERISA's

[3] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

procedures for adopting an amendment must be followed. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Even if the amendment does not violate any provision of ERISA, an employer's implementation of a plan amendment may nonetheless violate ERISA's fiduciary rules. *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988); *McKinnon v. Cairns*, 698 F. Supp. 852, 862 (W.D. Okla. 1988); *District 65, United Auto Workers v. Harper & Row Publishers, Inc.*, 696 F. Supp. 29, 33 (S.D.N.Y. 1988). Consequently, an employer may be liable for a breach of fiduciary duty through implementation of the amendment if the employer is a named fiduciary, ERISA § 402(a), 29 U.S.C. § 1102(a); the trustee or plan administrator, ERISA §§ 3(14), (16), 29 U.S.C. §§ 1002(14), (16); or a functional fiduciary, ERISA § 3(21), 29 U.S.C. § 1002(21).

Moreover, when a fiduciary makes a decision concerning plan assets attributable to employee contributions, it must be subject to even stricter scrutiny than a decision concerning plan assets attributable to employer contributions because ERISA itself treats employee contributions with special deference. *See generally Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982); ERISA §§ 203(a)(1), 204(c), 29 U.S.C. §§ 1053(a)(1), 1054(c); ERISA § 4044(a), (d)(3), 29 U.S.C. § 1344(a), (d)(3); 29 C.F.R. § 2510.3-102 (1997); 61 Fed. Reg. 41,220 (1996).

Finally, Congress established an unambiguous mechanism for distribution of benefits. ERISA clearly sets forth the benefits to which a participant is entitled, both prior to, and upon, termination. Participants are entitled to either their promised defined benefit or their own contributions plus interest, whichever is greater. ERISA

§ 204(c)(2)(B)-(C), 29 U.S.C. § 1054(c)(2)(B)-(C). Upon plan termination, after all plan liabilities are satisfied, participants are entitled to their proportionate share of any surplus. ERISA § 4044(d)(3), 29 U.S.C. § 1344(d)(3).

ARGUMENT

I. THE ACT OF AMENDING A PLAN DOES NOT ABSOLVE AN EMPLOYER OF FIDUCIARY LIABILITY.

A. The Lower Courts Need More Comprehensive Guidelines for Analyzing Fiduciary Breach Allegations Arising from an Employer's Amendment of its Plan.

Although this Court has recently decided two cases, holding that an employer cannot violate ERISA's fiduciary rules solely by amending its plan, *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), plainly the lower courts continue to struggle to define the exceptions implicit in the Court's use of the phrase "generally free" to amend. AARP submits that this case presents the Court with the opportunity to establish guidelines for the lower courts to use for analyzing fiduciary breach allegations arising from an employer's plan amendment.

B. An Employer Is Generally Free to Amend its Employee Benefit Plan as Long as ERISA's Substantive Provisions, the Express Terms of the Plan or ERISA's Procedures Are Not Violated.

This Court has made it clear that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify or terminate welfare plans." *Curtiss-Wright*, 514 U.S. at 78. This holding was extended to pension plans in *Spink*, 517 U.S. at 889-90.

Although both of these cases involved employer contributory plans, for the purpose of amending employee benefit plans, ERISA's statutory provisions do not differentiate between types of plans based solely on their sources of funding. *See generally* ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995) (the definition of fiduciary does not include plan design in the defined functions nor distinguish between funding sources).[4]

Nevertheless, employers do not have a completely unfettered right to amend their employee benefit plans. ERISA imposes several restrictions. Employer amendments cannot violate ERISA's substantive provisions such as its detailed accrual and vesting provisions. For example, if an employer amended its plan to require 15 years of service credit in order to vest in a pension, the employer would violate ERISA § 203(a), 29 U.S.C. § 1053(a). The employer would not be free to amend its plan to include such a provision. *Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994). Moreover, if an employer fails to follow ERISA's procedures in adopting an amendment or providing employees with notice of the amendment, the amendment may not be effective. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990). Nor can amendments violate the express terms of the plan, trust agreement,

[4] Congress did differentiate in some circumstances based on the source of the funding. *See, e.g.*, ERISA §§ 203(a)(1), 204(c), 29 U.S.C. §§ 1053(a)(1), 1054(c); ERISA § 4044(a), (d)(3), 29 U.S.C. § 1344(a), (d)(3); 29 C.F.R. § 2510.3-102 (1997); 61 Fed. Reg. 41,220 (1996). Congress could have differentiated between plans based on sources of funding concerning amendment of plans, but chose not to do so. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997) ("Had Congress intended . . . , it could have easily. . . .").

collective bargaining agreement or other governing documents. For example, if the plan terms expressly prohibit any amendments to the benefit accrual rules, an employer could not amend its plan to change these rules. *Id.*

Accordingly, employers are generally free to amend their employee benefit plans as long as no substantive provision of ERISA is violated, no express term of the plan's governing documents is violated, and ERISA's procedures for adopting an amendment are followed.

C. An Employer's Amendment of a Plan Does Not Necessarily Immunize its Post-amendment Actions.

1. Implementing a plan amendment may give rise to an ERISA fiduciary violation.

Although an employer is generally free to amend its plan at any time, AARP submits that an employer may still violate ERISA when implementing the plan amendment. *Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock*, 861 F.2d 1406, 1419 (9th Cir. 1988) (in plan termination, misuse of plan assets to further interests other than those of participants and beneficiaries states a claim upon which relief can be granted); *McKinnon v. Cairns*, 698 F. Supp. 852, 862 (W.D. Okla. 1988) (improper calculations of reversion of plan assets states a claim for fiduciary breach); *District 65, United Auto Workers v. Harper & Row Publishers, Inc.*, 696 F. Supp. 29, 33 (S.D.N.Y. 1988) (implementation of plan termination involves fiduciary functions).

An example illustrates that an employer may not be liable under ERISA's fiduciary provisions solely for amending a

plan,[5] but the plan's fiduciaries may be liable under those same provisions for implementing that amendment:

> In 1988, an employer amends its plan to prohibit any investment in securities. The plan trustees follow the instructions of the amendment and invest all of the plan's assets in bonds and money market instruments. They continue to do so until sued in 1998. Due to the rising stock market, the plan's investments annually lose the opportunity for double-digit investment gains. The trustees' adherence to the employer's plan amendment will result in a violation of ERISA's fiduciary rules based on the trustees' continued failure to diversify and their lack of prudence in investing the assets of the plan. *See, e.g.*, ERISA § 404(a)(1)(B)-(C), 29 U.S.C. § 1104(a)(1)(B)-(C). Accordingly, the plan trustees' implementation of the employer's amendment is a fiduciary violation.

However, the plan trustees have an alternative to following the employer's instructions set forth in the plan amendment. The trustees can chose to ignore the employer's instructions and refuse to implement the amendment. If the trustees do not implement the plan amendment, then the trustees will not violate ERISA's diversification and prudence provisions. Indeed, such inaction is consistent with ERISA's mandate in section 404(a)(1)(D) requiring fiduciaries to ignore any plan provision if it violates any provision of title I or title IV of ERISA. 29 U.S.C. § 1104(a)(1)(D) (a fiduciary must follow plan documents *insofar as they are consistent with title I and title IV. . . .*).

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[5] As we have previously stated in Section I.B, *supra*, the employer may be liable for a violation of ERISA's substantive provisions.

Accordingly, fiduciaries must independently review and analyze plan amendments in order to determine whether they violate any provision of title I or title IV including ERISA's fiduciary provisions. *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307, 310, 314 (8th Cir. 1979) (ERISA § 404(a)(1)(D) was violated when fiduciaries followed the plan's "bad boy" clause); *Central Trust Co., N.A. v. American Avents Corp.*, 771 F. Supp. 871, 875-76 (S.D. Ohio 1989) (trustee correctly ignored pass-through voting provisions and exercised independent judgment concerning sale of ESOP's stock); *Mobile, Alabama-Pensacola, Florida Building & Construction Trades Council v. Daughtery*, 684 F. Supp. 270, 282 (S.D. Ala. 1988) (plan provisions providing lifetime tenure for trustees could not be given effect under ERISA § 404(a)(1)(D)); *see generally* RESTATEMENT (SECOND) OF TRUSTS § 167 (1959) (the court will permit the trustee to deviate from the trust if compliance would impair the purposes of the trust).

2. An employer may be a fiduciary and thus breach its fiduciary duty when implementing a plan amendment.

ERISA plainly recognizes that an employer may wear two hats when involved with an employee benefit plan. *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985). ERISA § 408(c)(3) states that the fiduciary rules shall not prohibit any fiduciary from "serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest." 29 U.S.C. § 1108(c)(3). And, this Court has recognized that an employer may wear more than one hat when communicating with participants about its benefit plan. *See, e.g.*, *Varity Corp.*, 516 U.S. at 498 ("Varity was *both* an employer and the benefit plan's administrator. . . ") (emphasis added).

An employer may be accorded fiduciary status in three ways. First, the employer may be a "named fiduciary" under the plan documents.[6] ERISA § 402(a)(1)-(2), 29 U.S.C. § 1102(a)(1)-(2) ("a fiduciary who is named in the plan instrument, or who . . . is identified as" such by the employer); 29 C.F.R. § 2509.75-5, at FR-3 (1997) (a corporation may be designated a "named fiduciary"). Unlike a functional fiduciary pursuant to ERISA § 3(21), a named fiduciary is a fiduciary for all purposes. *Birmingham v. SoGen-Swiss International Corp. Retirement Plan*, 718 F.2d 515, 521-522 (2d Cir. 1983); *Arakelian v. National Western Life Ins. Co.*, 680 F. Supp. 400, 404 (D.D.C. 1987).

Second, the employer may act as the trustee or plan administrator of the plan which automatically establishes fiduciary status. ERISA § 3(14), 29 U.S.C. § 1002(14) ("any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian) . . . ."); 29 C.F.R. § 2509.75-8, at D-3 (1997) (certain positions such as trustee or plan administrator "by the very nature of [their] position" must be fiduciaries). Indeed, where no plan administrator is designated, then the plan sponsor (generally the employer) is considered the plan administrator by default. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

The third way occurs when the employer acts as a fiduciary. "[T]o the extent" that an employer "exercises any discretionary authority or discretionary control respecting management" of the plan, or "has any discretionary authority or discretionary responsibility in the

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[6] The reason for requiring a "named fiduciary" is so that employees may know who is responsible for operating and administering the plan. H.R. Conf. Rep. No. 93-1280, at 297 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5081; 29 C.F.R. § 2509.75-5, at FR-1 (1997).

administration" of the plan within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), the employer is a fiduciary. Consequently, those persons, including employers, who carry out functions relating to asset management, plan administration and provision of investment advice for a fee are usually held to be fiduciaries.

This Court has recognized that a person can be a fiduciary for some purposes but not for others. *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 94-97 (1993). *Varity Corp. v. Howe* elaborates on *Hancock* to hold that an employer may be a fiduciary to the extent that it has discretionary authority relating to plan administration. 516 U.S. at 498. In *Varity*, the employer provided information to plan participants about plan benefits and used persons for these communications who employees knew had the authority to act as fiduciaries; communications about plan benefits are the type of duties that a trust document imposes upon persons who administer the plan; the message communicated was the type of message persons who administer the plan would have conveyed. *Id.* at 502-04. These activities indicated that when communicating with plan participants over the stability of their benefits the employer was engaging in plan administration. *Varity*'s broad reading of ERISA's definition of fiduciary is in harmony with this Court's decision in *Mertens v. Hewitt Associates*, 508 U.S. 248, 261-62 (1993), which acknowledged that ERISA's functional definition of fiduciary expands "the universe of persons subject to fiduciary duties . . . . "

Consistent with these Supreme Court cases is the circuit courts' recognition that employers may be fiduciaries based on certain activities, but not others. For example, an employer's appointment of plan fiduciaries, and subsequent monitoring of their activities, are fiduciary functions. *See*

29 C.F.R. § 2509.75-8, at D-4 (1997); *accord, Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir. 1988); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 735-36 (7th Cir. 1986); *Birmingham v. SoGen-Swiss International Corp. Retirement Plan*, 718 F.2d 515, 521-522 (2d Cir. 1983). An employer may become a fiduciary if it exercises *de facto* control over plan administration or plan assets. *See, e.g., Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1459-60 (5th Cir. 1986) (if employer controlled trustees' decision to sell stock, it became a fiduciary); *see Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988) (union official became fiduciary by choosing service provider); *cf. United States v. Grizzle*, 933 F.2d 943, 947-48 (11th Cir. 1991) (in *dictum*, employer becomes a fiduciary when misappropriating employee contributions to plan).

Thus, an employer may be liable for a breach of fiduciary duty when implementing a plan amendment if the employer is a named fiduciary, the trustee or plan administrator, or a functional fiduciary. What must be done, then, is to separate those actions an employer takes as a fiduciary which are regulated by ERISA from those actions an employer takes as a business entity which are unregulated by ERISA.

D. Transactions with Plan Assets Which Include Employee Contributions Must Be Scrutinized More Strictly than Other Transactions.

ERISA fiduciaries' duties are "the highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). Thus, ERISA fiduciaries must handle plan assets with the highest care and prudence. *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983) (Congress made more exacting the requirements of the common law of trusts relating to employee benefit trust funds); *accord*,

Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. . . . Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.") As stringent as this standard is, ERISA treats plan assets attributable to employee contributions to an even higher standard of care than other assets held on behalf of the participants and beneficiaries.

Examples abound. Unlike benefits earned from employer contributions, an employee is automatically vested in his or her contributions. ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1). The accrual of benefits is different for benefits derived from employee contributions than from employer contributions. ERISA § 204(c), 29 U.S.C. § 1054(c). When a plan is terminated, assets of the plan are first allocated to the accrued benefit derived from non-mandatory employee contributions and then to the accrued benefit derived from mandatory employee contributions. Only then are assets allocated to benefits derived from sources other than employee contributions. ERISA § 4044(a), 29 U.S.C. § 1344(a). After all liabilities are satisfied upon a plan termination, employees are entitled to a proportionate share of the surplus derived from their contributions. ERISA § 4044(d)(3), 29 U.S.C. § 1344(d)(3). Moreover, the Department of Labor recently tightened regulations concerning the timing of deposits of employee contributions to 401(k) accounts in order to prevent employers from using the employees' contributions for corporate needs and to ensure that employees receive maximum investment gain. 29 C.F.R. § 2510.3-102 (1997); 61 Fed. Reg. 41,220 (1996).

Consequently, as high as the standard of fiduciary conduct is generally for a fiduciary's handling of plan assets, a fiduciary's decision concerning plan assets

attributable to employee contributions must be subject to even stricter scrutiny than plan assets attributable to employer contributions.

II. PARTICIPANTS MUST RECEIVE THEIR PROPORTIONATE SHARE OF A PENSION PLAN'S SURPLUS UPON TERMINATION.

A. Participants Are Entitled to Either Their Promised Benefit or Their Own Contributions Plus Interest, Whichever Is Greater.

Congress established a specific mechanism to ensure that pension participants will receive their promised benefits -- both in an ongoing plan and upon a plan termination. That mechanism must be followed. *See Geissal v. Moore Medical Corp.*, No. 97-689, 1998 WL 292075 (U.S. June 8, 1998) (Congress' mechanism for delivery of continuation health coverage must be followed as set forth in the statute).

In an on-going pension plan, participants are entitled to receive their promised defined benefit -- that is, a fixed periodic payment (or actuarial equivalent) -- if they meet the plan's participation and vesting requirements. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980) ("if a worker has been promised a defined pension benefit upon retirement -- and if he has fulfilled whatever conditions are required to obtain a vested benefit -- he actually will receive it.") And, participants are always vested in the amount of their accrued benefits derived from their own contributions. ERISA § 203(a)(1), 29 U.S.C. § 1053(a)(1). That amount is determined by adding the mandatory employee contributions and interest as specified under the statute. That amount might be more or less than the promised benefit. ERISA § 204(c)(2)(B)-(C), 29 U.S.C. § 1054(c)(2)(B)-(C).

Thus, unless there is a plan termination, regardless of how large the surplus is, the plan is under no *legal* obligation to provide more than the larger of the promised benefit or the employee contributions and imputed interest.[7] If there is no plan termination, plan assets must remain in the plan in order to satisfy future benefit obligations and ERISA's minimum funding requirements, ERISA § 302, 29 U.S.C. § 1082, and must be handled in accordance with ERISA's fiduciary rules.[8] *See generally Hancock*, 510 U.S. at 95-96.

B. Upon Termination, Participants Are Entitled to Their Proportionate Share of Any Surplus.

Where there is a termination, however, the statute clearly sets forth how employee contributions and corresponding investment income are to be handled. ERISA § 4044 states that after plan liabilities are settled, employees will receive their proportionate share of the surplus. 29 U.S.C. § 1344. Thus, equitable distribution of surplus assets requires a tracing of contributions to determine the funding of the nonforfeitable benefits.

Of particular interest is the case of *Holland v. Valhi, Inc.*, 22 F.3d 968 (10th Cir. 1994), in which the employer attempted to use the employees' contributions and corresponding income to settle all of the plan's liabilities. In rejecting the employer's decision to use employee

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[7] As a policy matter, however, AARP submits that employers should review their benefit structures and provide increased benefits, as appropriate, in order to serve the interests of the participants and beneficiaries.

[8] Plan surplus assets may be transferred between a pension plan and health plan to pay for retiree health liabilities in the narrowest of circumstances and only if the detailed statutory requirements are followed. IRC § 420.

contributions to fund benefits under the allocation rules, 29 U.S.C. § 1344, the court turned to ERISA's legislative history:

> The Committee expressly rejects the idea . . . that the sum of employee contributions and earnings thereon is used first, before any employer contributions, to fund all benefits described in the allocation rules under subsection (a) ERISA section 4044 [29 U.S.C. § 1344(a)]. The application of such a rule would mean that, except in the rarest of cases, no portion of the residual assets would ever be distributed to plan participants and beneficiaries. That result was never intended.

Holland, 22 F.3d at 978, *quoting* H.R. REP. NO. 100-391(I), at 130 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-105. The court held that the liabilities must be settled in the same proportion as the contributions: that is, if the employer contributed 50% and the employees contributed 50%, each must contribute 50% toward the liabilities and each group will receive 50% of any surplus.

Accordingly, if there is a plan termination, then participants and beneficiaries are entitled to a share of the pension plan's surplus equal to their proportionate share of contributions.

CONCLUSION

AARP respectfully requests the Court to adopt the guidelines set forth herein for determining if a fiduciary breach has occurred when an employer amends its plan. AARP also requests that the mechanism established by

Congress for distribution of benefits, both prior to, and upon, plan termination be given full force and effect.

Respectfully submitted,

July 2, 1998

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